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Title: Tulsa Professional Collection Services, Inc., Appellant
v.
Joanne Pope, Executrix of the Estate of H. Everett Pope, Jr., Deceased

Court: Supreme Court of Oklahoma

Counsel for appellant: Rose,Randall E.

Counsel for appellee: Smith,Phillip K.

NOTE: Notice of appeal filed 3/31/87

Entry	Date	Note	Proceedings and Orders
1	Jun 5 1987	G	Statement as to jurisdiction filed.
3	Jun 19 1987		Order extending time to file response to jurisdictional statement until July 19, 1987.
4	Jul 16 1987		Motion of appellee Joanne Pope to dismiss or affirm filed.
5	Jul 22 1987		DISTRIBUTED. September 28, 1987
6	Sep 21 1987	X	Reply brief of appellee Tulsa Professional Collection Services filed.
7	Oct 5 1987		PROBABLE JURISDICTION NOTED.
			**********
8	Nov 19 1987		Joint appendix filed.
9	Nov 19 1987		Brief of appellant Tulsa Professional Collection Services filed.
10	Dec 8 1987		Record filed.
11	Dec 21 1987		Brief of appellee Joanne Pope filed.
12	Dec 29 1987		CIRCULATED.
13	Jan 5 1988		SET FOR ARGUMENT. Wednesday, March 2, 1988. (2nd case). (1 hour).
14	Jan 23 1988	X	Reply brief of appellant Tulsa Professional Collection Services, Inc. filed.
15	Mar 2 1988		ARGUED.

JURISDICTIONAL

STATEMENT

86 1961

No. 86-

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1986

IN THE MATTER OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

TULSA PROFESSIONAL
COLLECTION SERVICES, INC.
Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF OKLAHOMA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does compliance with the statutory requirements providing publication notice to creditors of the running of a statutory time period to file claims satisfy the due process requirements of the Fourteenth Amendment of the United States Constitution?

2. Was the publication notice provided, further made insufficient by the Executrix's actual knowledge that Appellant was creditor of the estate?

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No. 86-

In The Supreme Court Of The United States

OCTOBER TERM, 1986

IN THE MATTER OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

TULSA PROFESSIONAL
COLLECTION SERVICES, INC.
Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF OKLAHOMA

JURISDICTIONAL STATEMENT

Tulsa Professional Collection Services, Inc., the Appellant, appeals from the final judgment of the Supreme Court of Oklahoma, dated March 10, 1987, denying rehearing of its opinion rendered November 18, 1986, holding that Title 58 Okla. Stat. Ann. §331 is not

unconstitutional as being in violation of Appellant's due process rights under the Fourteenth Amendment of the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma appears in Appendix A attached hereto. The order of the Supreme Court of Oklahoma denying rehearing is printed in Appendix B attached hereto. Neither the opinion nor the order has been published in the Pacific Reporter.

JURISDICTION

The judgment of the Supreme Court of Oklahoma holding that Title 58 Okla. Stat. Ann. §331 was not unconstitutional as being in violation of Appellant's due process rights under the Fourteenth Amendment of the United States Constitution was entered on November 18, 1986. A Petition for Rehearing was denied on March 10, 1987.

A Notice of Appeal to the Supreme Court of the United States was timely filed in the Supreme Court of Oklahoma on March 31, 1987.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

HOW THE FEDERAL QUESTION WAS RAISED

At the earliest stage of the proceedings below, Appellant raised its due process claim in a Petition for Rehearing before the Court of Appeals, Division IV, State of Oklahoma in Case No. 62,204, filed August 13, 1985. Appellant argued that Title 58 Okla. Stat. Ann. §331 was unconstitutional for the reason that notice by publication alone is not sufficient to satisfy the due process requirements of the Fourteenth Amendment of the United States Constitution. This argument was based on case law that had not yet been decided at the time of filing briefs therein. The Petition for Rehearing was denied, but a supplemental opinion rejecting this specific argument, as well as other arguments, was rendered by the Court of Appeals, Division IV, State

of Oklahoma on October 8, 1985. A Petition for Writ of Certiorari was filed with the Supreme Court of Oklahoma on October 28, 1985, and the Writ was granted. In its opinion rendered on November 18, 1986, the Supreme Court of Oklahoma vacated the opinion of the Court of Appeals, Division IV, and determined that publication notice to a known creditor was not required in order to satisfy the due process requirements of the Fourteenth Amendment of the United States Constitution. It determined specifically that the publication notice given to Appellant pursuant to 58 Okla. Stat. Ann. §331 was sufficient to withstand a due process challenge. It thereby considered and expressly rejected the federal constitutional claim presented for its consideration.

STATEMENT UNDER 28.4(c)

Since the proceeding draws into question the constitutionality of Title 58 Okla. Stat. Ann. §331, a state statute affecting the public interest, and neither the state of Oklahoma nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(b) may be applicable.

No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403(b), certified to the State Attorney General the fact that the constitutionality of such statute has been drawn in question.

STATEMENT OF THE CASE

H. Everett Pope, Jr., was admitted to St. John Medical Center, Tulsa, Oklahoma, on or about November 23, 1978. Mr. Pope died testate at the hospital on or about April 2, 1979. A Petition for Probate of Will was filed June 28, 1979, and the Notice to Creditors was published for two consecutive weeks on July 17, 1979, and July 24, 1979, as required by Title 58 Okla. Stat. Ann. §331. Payments for the expenses of last illness continued to be received from shortly after Mr. Pope's death through January 31, 1980, leaving a balance due of $14,657.55. After the final payments were made by Mr. Pope's insurance company and the matter was assigned to Tulsa Professional Collection Services, Inc., Appellant herein, Appellant was advised by the attorney for the estate, on or about July 24, 1980, that the estate was solvent and that the remaining balance would be paid on presentation of itemized statements for services. The matter was referred to counsel herein on or about May 24, 1982, and payment was promised on numerous occasions until October 17, 1983. On October 17, 1983, Appellant filed an Application for Order Compelling Payment of Expenses of Last Illness in the probate case No. P-79-687, styled In the Matter of the Estate of H. Everett Pope, Jr., deceased, filed in the District Court of Tulsa County, State of Oklahoma. On March 28, 1984, an order was entered by the District Court of Tulsa

County denying the request for an Order Compelling Payment, on the grounds that a creditor's claim should have been filed pursuant to Title 58 Okla. Stat. Ann. §334. Appellant herein argued that no such claim was required under Oklahoma law in that Title 58 Okla. Stat. Ann. §594 compels payment of the expenses of last illness. An appeal on this issue followed and the Trial Court's decision was affirmed, in an opinion rendered July 23, 1985, by the Court of Appeals, Division IV, State of Oklahoma.

Thereafter, pursuant to case law that had not been decided at the time the appeal began, Appellant petitioned the Court of Appeals, Division IV, for rehearing and rehearing was denied. Appellant then filed a Petition for Writ of Certiorari on October 28, 1985, to the Supreme Court of Oklahoma, and said Petition was granted on December 9, 1985. The Supreme Court of Oklahoma rendered its decision denying a violation of Appellant's due process rights under the Fourteenth Amendment to the United States Constitution on November 18, 1986. A Petition for Rehearing of this decision was filed on December 29, 1986, and rehearing was denied on March 10, 1987. On March 31, 1987, Appellant filed a Motion to Stay Issuance of Mandate and Motion to Stay Proceedings in the Supreme Court of Oklahoma, which such Motion was granted pending a resolution of this matter by this Court. On March 31, 1987, Appellant also filed its Notice of Appeal to the

Supreme Court of the United States from the final judgment of the Supreme Court of Oklahoma entered on March 10, 1987.

THE QUESTION IS SUBSTANTIAL

The question presented to the Court is one that has never before been given plenary consideration by this Court. The general subject matter of this appeal, creditor's claims in probate cases, has a direct and significant impact on every sector of our society. For these reasons, plenary consideration is necessary to effectively address the questions raised.

In *Continental Insurance Company vs. Moseley,* 653 P.2d 158 (Nev. 1982), a fact pattern very similar to that in the instant case was presented to this Court. On review of that case, the matter was remanded to the Nevada Supreme Court in *Continental Insurance Company vs. Moseley,* 463 U.S. 1202, 103 S.Ct. 3530, 77 L.Ed.2d 1383 (1983), in a memorandum decision. Relying on a line of cases beginning with *Mullane vs. Central Hanover Bank and Trust Company,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and culminating with *Mennonite Board of Missions vs. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), this Court addressed the issue of the adequacy of notice in the context of a probate proceeding, when the only notice given was accomplished by publication. The notice had been

received by counsel for the prospective claimant on the last day for filing claims. The claim was not filed until two days later and it was determined by the Nevada Supreme Court that the claim was forever barred. The Nevada Supreme Court considered the argument of a violation of the due process requirements of the United States Constitution and determined that the creditor was not denied due process when actual notice was afforded to the creditor, although on the last day for filing claims. This Court, in its memorandum decision responded by vacating the judgment and remanding the case to the Nevada Supreme Court for further consideration in light of *Mennonite, supra.*

The Nevada Supreme Court in the second decision on the Moseley case decided specifically that this Court's holdings in *Mennonite, supra,* and *Mullane, supra,* require that more than service by publication is required to afford due process to a known creditor in a probate case. *Continental Insurance Company vs. Moseley,* 683 P.2d 20 (Nev. 1984). (Hereafter referred to as *Moseley II.*)

The Supreme Court of Oklahoma was presented the same due process argument by Appellant herein. However, instead of adopting the opinion rendered in *Moseley II, supra,* the Oklahoma Supreme Court in footnote 17 of its opinion set forth in Appendix A, page 11a, relied on the decision in *Estate of Busch vs. Ferrell-*

Duncan Clinic, Inc., 700 S.W.2d 86 (Mo. 1985). In Footnote 2 of *Estate of Busch, supra,* the reasoning of *Moseley II, supra,* was rejected on the grounds that:

> [t]he Supreme Court's procedure — granting Certiorari, vacating and remanding for further consideration in light of *Mennonite Bd. of Missions, supra,* — does not conclusively indicate that the Supreme Court has held, or will hold, *Mullane* applicable in the circumstances of the remanded case. We are not persuaded by the Nevada Court's holding after considering the *Mennonite* case.

Estate of Busch, supra, 700 S.W. 2d at 87. The Oklahoma Supreme Court by its reliance on the reasoning in *Estate of Busch, supra,* has rejected the resolution in *Moseley II, supra.* Further, the Oklahoma Supreme Court has specifically rejected the finding by the Supreme Court of Nevada that the decision in *Moseley II, supra,* by this Court, requires that more than mere publication notice be given in the context of a probate proceeding, when substantial rights of creditors will be adversely affected because of a complete bar to any claim.

In *Schroeder vs. City of New York,* 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), it was noted by the Court that:

> The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.

371 U.S. at 213.

In the instant case, it is not denied that the interests of the creditor hospital are directly affected by the representative of the estate when the representative causes publication of a notice to file claims. It is not denied that the representative of the estate knew the name and address of the creditor and knew that services had been rendered to the date of death of the deceased. Further, it is not denied that the representative of the estate monitored payments made on behalf of the deceased by the deceased's insurance company for approximately ten months after the date of death and six months after the Notice to Creditors was published.

The notice contemplated by the Fourteenth Amendment of the United States Constitution requires that when an action is pending, that the person whose interests are affected be "properly and seasonably notified". *Pennoyer vs. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877). Interestingly, the Oklahoma Supreme Court notes in the decision being appealed "that the burden of affording proper notice rests on the party whose responsibility it is to give that notice." Appendix A, Page 7a. The Oklahoma Supreme Court further notes that since the operation of the statutes might result in the forfeiture of a claimed right, the burden of pleading and proof regarding compliance with the provisions properly rests on one claiming the benefit of those provisions. The Oklahoma Supreme Court then decides that proper notice is given by compliance with the statutes

concerning notice to creditors. The Oklahoma Supreme Court appears to be saying that the due process clause of the Fourteenth Amendment of the United States Constitution does not apply to a limitations statute. However, the focus of the inquiry should not be whether there was compliance with a statutory procedure, but whether the notice satisfied the requirements of the due process clause of the Fourteenth Amendment of the United States Constitution. Indeed, this Court has held that mere compliance with a statute does not afford notice. *Covey vs. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956). Surely a valid and valuable right and cause of action cannot now be divested in Oklahoma without due process of law, simply by complying with a statutory procedure.

An increased sensitivity by the Court to due process matters has resulted in a requirement of reasonable notice in numerous and varied situations. The application of *Mullane, supra*, to this case should require that the notice afforded be reasonably certain of reaching especially those parties who are known creditors with a known claim against the estate. *Mullane, supra*, determined that:

> [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Mullane, 339 U.S. at 315. Mere publication of the notice

to creditors in the instant case completely disregards the requirements of *Mullane, supra.* In *Greene vs. Lindsey,* 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 259 (1982), it was determined by this Court that the question of due process as it relates to a notice procedure has always been its effect on "a particular class of cases." *Greene, supra,* at 451. The class of cases involved herein must be given the protection offered by the due process clause of the Fourteenth Amendment to the United States Constitution. The members of this class generally do not have the ability to safeguard their interests as contemplated by *Mullane, supra.* There is not just "the possibility of conceivable injury" as established in *Mullane, supra,* 339 U.S. at 315, but the *probability* of *great injury, i.e.,* the total loss of a claim. (Emphasis added).

In *Moseley II, supra,* the Supreme Court of Nevada determined that the *Moseley* memorandum decision issued by this Court on June 27, 1983, required that more than publication notice be given when the estate has actual knowledge of a creditor's claim and actual knowledge of the name and address of the creditor. Even though actual notice was given in *Moseley II, supra,* it was determined to be defective because the actual notice given did not clearly identify the name of the decedent. In the instant case, the Supreme Court of Oklahoma reviewed *Moseley, supra,* this Court's memorandum decision in remanding the case to the Supreme Court of Nevada to address the due process

issues and *Moseley II, supra,* and determined that the publication notice given was sufficient to satisfy the due process requirements of the Fourteenth Amendment of the United States Constitution. The Oklahoma Supreme Court further noted that regardless of *Mennonite Board of Missions, supra,* this Court had not held in the *Moseley* memorandum decision, *supra,* nor would it hold in any subsequent decision, that *Mullane, supra,* was applicable to this kind of case.

In determining whether the notice given is sufficient to inform a person of the pendency of a proceeding affecting his rights, the constitutional test imposed has become a consideration of the particular class of cases involved, the possibility of conceivable injury and the totality of circumstances, to determine whether the notice afforded was reasonable. Notice by publication to a known creditor in the context of a probate matter completely fails this constitutional test.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

By Randall E. Rose

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COUNSEL FOR APPELLANT

June 1, 1987

APPENDIX A

No. 62,204

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE ESTATE OF H. EVERETT POPE, JR., DECEASED.

TULSA PROFESSIONAL COLLECTION SERVICES, INC.,
Appellant,

v.

JOANNE POPE, Executrix of the Estate of H. Everett Pope, Jr.,
Appellee.

CERTIORARI TO THE
COURT OF APPEALS, DIVISION IV

APPEAL FROM DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

Honorable Robert D. Frank, Trial Judge

Two questions are presented for this Court in this case. The first is whether 58 O.S. 1971 § 594, exempted expense of the last illness of a decedent from the requirements of 58 O.S. 1971 §§ 331 and 333, that a claim be filed before payment may be made by the personal representative of an estate. The second question is whether the publication notice given to appellant pursuant to 58 O.S. 1971 § 331 was sufficient to withstand a due process challenge. We answer the first question in the negative and the second question in the affirmative.

CERTIORARI PREVIOUSLY GRANTED: OPINION AND SUPPLEMENTAL OPINION ON

REHEARING OF COURT OF APPEALS VACATED: ORDER OF TRIAL COURT AFFIRMED

Naylor & Williams, Inc.
By: David A. Tracy and
Randall E. Rose
Tulsa, Oklahoma — For Appellant.

Smith & Smith
By: Phillip K. Smith
Tulsa, Oklahoma — For Appellee.

LAVENDER, J.:

I.

Appellant, Tulsa Professional Collection Services, Inc., was assigned a debt owed to St. John Medical Center. This debt had arisen from the expenses of the last illness of H. Everett Pope, Jr. Appellant initiated the current action by the filing of an application for an order compelling the payment of the expenses of the last illness of H. Everett Pope, Jr. The following facts were stipulated to by the parties in conjunction with the trial court's ruling on the application:

1. H. Everett Pope, Jr. ("decedent") was admitted to St. John Medical Center ("hospital") in Tulsa on 23 November 1978. He remained in the hospital until his death on 2 April 1979.

2. The expenses of decedent's hospital stay were in excess of $142,000.00. Decedent's insurer made some payments to hospital, leaving a net balance due of $14,657.55. The parties dispute the amount of the net balance due attributable to decedent's last illness.

3. Decedent's will was admitted to probate on 16 July 1979.

4. The qualified personal representative of decedent's estate published notice to creditors on 17 July 1979 and 24 July 1979.

5. No timely creditor's claim was presented to the personal representative within the applicable statutory period of 4 months [sic]. The parties dispute whether a creditor's claim was ever presented to the personal representative, but if presented, such claim was not approved. No suit to compel the personal representative to approve the claim has been filed.

6. Assignee filed an "Application for Order Compelling Payment of Expenses of Last Illness" on 17 October 1983. It was set for hearing on 10 November 1983. Upon the above stipulations of fact, briefs were scheduled to be submitted, and the matter was taken under advisement by the Court.

The trial court found that appellant's failure to file a claim for the debt within the time noted in appellee's publication of notice to creditors of the estate of H. Everett Pope, Jr., barred the assertion of the claim. The trial court denied appellant's application and this appeal ensued.

On appeal, as in the trial court, this dispute was characterized as a question of statutory interpretation. Appellee relied upon the general chapter in the probate code governing claims against the estate; specifically 58 O.S. 1971 § 331, which provided in pertinent part:

> Every executor or administrator must, immediately after his appointment, give notice to the creditors of the deceased, requiring all persons having claims against said deceased to present the same,

with the necessary vouchers, to such executor or administrator, at the place of his residence or business, to be specified in the notice, within two (2) months from the date of the first publication of said notice; such notice must be published in some newspaper in said county once each week for two (2) consecutive weeks. . . .

and 58 O.S. 1971 § 333, which provided in pertinent part:

> If a claim arising upon a contract heretofore made, be not presented within the time limited in the notice, it is barred forever, ...

Appellant, on the other hand, relied on the subchapter of the probate code governing payments of the debts of the estate. Appellant argued that 58 O.S. 1971 § 594 dispensed with the requirement that a claim be filed in connection with the expenses of the last illness. Section 594 provides:

> The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this chapter, the payment has been ordered by the court.

Both appellant and appellee argued authorities from other jurisdictions concerning the construction of statutes similar to section 594. Some authorities had found such a statute to relieve the necessity of filing a claim.[1] Appellee's authority had found that failure to timely file a claim had resulted in the claim being barred

[1] The authorities particularly relied upon by appellant were *In re Skillman's Estate*, 146 Iowa 601, 125 N.W. 343 (1910); *Wolfe v. Knapp*, 127 Iowa 479, 103 N.W. 369 (1905); *In re Hansen's Estate*, 55 Utah 23, 184 P. 197 (1919).

despite the presence of a statute similar to section 594.[2] Appellee also cited from this Court's statements in *State ex rel. Central State Griffin Memorial Hospital v. Reed*,[3] to the effect that:

> The purpose of the nonclaim statute [58 O.S. 1971 § 333] is to facilitate the handling and closing of estates. The legislature has considered the importance of this question in its amendment of the statute reducing the period of time within which the claim may be filed from four months to two months. Clearly this is an expression of the legislative concern for the expediting and disposing-of administration of estates without delay.

The trial court concluded that a construction of section 594 which would have the effect of allowing certain claims to be maintained outside the time limits of the nonclaim provisions would be contrary to the legislative intent behind those provisions as set forth in *Central State Griffin Memorial Hospital*. On appeal, the Court of Appeals, Division IV, affirmed the trial court's ruling.

In reviewing the decisions of the courts below we find the reasoning applied to this question of law to be correct. In the case of *Rogers v. Oklahoma Tax Commission*,[4] we stated in Court's syllabus:

> In the construction of statutes, harmony, not confusion, is to be sought. The true rule is that when two acts or parts of acts are reasonably susceptible of a construction that will give effect to both and

[2] The authority presented by appellee in support of this proposition regarding the construction of section 594 was *In re Estate of Bachand*, 307 N.W.2d 140 (S.D. 1981).

[3] 493 P.2d 815, 818 (Okla. 1972).

[4] 263 P.2d 409 (Okla. 1952).

the words of each, without violence to either, it should be adopted in preference to one which, though reasonable, leads to the conclusion that there is a conflict.

As properly noted by the Court of Appeals, the statutory framework of 58 O.S. 1971 §§ 331 through 354 constitutes a system of safeguards against invalid and improper claims against an estate, as well as a system designed to expedite the administration of these estates. To find that section 594 would allow some claims to be maintained outside this system would directly conflict with the clear intent of these statutes. It is, moreover, possible to read the cited provisions in harmony. Section 594 provides that the personal representative of the estate must pay the expenses of the last illness as soon as funds are available when a proper claim[5] has been presented therefore.

II.

Following the Court of Appeals' affirmance of the trial court's decision in this case, appellant petitioned that court for rehearing. In its petition for rehearing, appellant raised, for the first time, a due process argument based on an alleged failure to give actual notice of probate proceedings and of the necessity to file claims. Appellant asserted that appellee knew of the existence of its claim at the time notice was published pursuant to 58 O.S. 1971 § 331. Appellant then argued that recent decisions of this Court[6] and other courts[7]

[5] See *Reed v. Charles Broadway Rouse, Inc.*, 174 Okla. 522, 50 P.2d 1097 (1935.)

[6] *Cate v. Archon Oil Co., Inc.*, 695 P.2d 1352 (Okla. 1985).

[7] *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); *Continental Ins. Co. v. Mosely*, 100 Nev. 337, 683 P.2d 20 (1985).

required that actual notice be given under these circumstances. Appellant argued that to apply the bar of the nonclaims statute in the absence of actual notice to a known creditor would deprive that known creditor of due process.

In a supplemental opinion on rehearing the Court of Appeals rejected this argument and denied rehearing. In the supplemental opinion it was stated that the argument was procedurally defective as it was initially raised in the petition for rehearing. The Court of Appeals then dismissed the argument on the ground that there was no evidence to show that appellant did not have actual notice of the probate proceedings.

We first address the Court of Appeals' assertion that the question of due process is procedurally inappropriate for consideration. The question of adequacy of notice goes to the jurisdiction of the court.[8] A matter involving a question of jurisdiction should be considered even if submitted initially in a petition for rehearing.[9]

The Court of Appeals' disposition of appellant's argument on the grounds that there was no evidence to support a finding that appellant did not have actual notice is also erroneous. We have previously noted that the burden of affording proper notice rests on the party whose responsibility it is to give that notice.[10] And, since the operation of the nonclaims provisions result in the forfeiture of what might otherwise be meritorious claims, the burden of pleading and proof regarding compliance with the provisions properly rests on one claiming the benefit of those provisions.[11]

[8] *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713 (Okla. 1968).

[9] See *Pointer v. Hill*, 536 P.2d 358 (Okla. 1975); and see also *Davis v. Sandlin*, 392 P.2d 722 (Okla. 1964).

[10] *Bomford v. Socony Mobil Oil Co.*, 440 P.2d at 719.

[11] See *Hitt v. J. B. Coghill, Inc.*, 641 P.2d 211 (Alaska 1982).

The question of the notice required under 58 O.S. 1971 § 331 has not been previously addressed by this Court. However, the question of the sufficiency of notice required to meet due process requirements in the context of the operation of nonclaims statutes has been addressed in a number of jurisdictions. Examining the relation of the nonclaims statutes to the line of cases originating with *Mullane v. Central Hanover Bank and Trust Co.*,[12] and culminating most recently in *Mennonite Board of Missions v. Adams*,[13] the courts have clearly held that the reasoning behind those cases was not applicable to the operation of the nonclaims statutes.[14] Most recently, the Supreme Court of Missouri, in addressing the question of the applicability of due process requirements set forth in the United States Supreme Court cases following *Mullane*, stated:[15]

> These cases make it clear that when the rights or interests of a person are sought to be affected by judicial or quasi-judicial decree, due process requires that the person be given notice reasonably calculated to inform that person of the pending proceeding and an opportunity to appear and object. However, we do not believe this doctrine requiring more notice than that afforded by publication should be applied to notice under nonclaim

[12] 339 U.S. 306 (1950).

[13] Supra, note 7.

[14] *Brunell Leasing Corp. v. Wilkins*, 11 Ariz. App. 165, 462 P.2d 858 (1969); *Gano Farms, Inc. v. Estate of Kleweno*, 2 Kan. App.2d 506, 582 P.2d 742 (1978); *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*, 700 S.W.2d 86 (Mo. 1985); *Baker National Bank v. Henderson*, 151 Mont. 594, 445 P.2d 574 (1968); *New York Merchandise Co., Inc., v. Stout*, 43 Wash.2d 825, 264 P.2d 863 (1953); *In re Estate of Fessler*, 100 Wisc.2d 437, 302 N.W.2d 414 (1981).

[15] *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*, 700 S.W.2d at 88, 89.

> statutes. The function served by notice is different, as is the nature of the right being affected. In *Mullane*, and the cases following it, the person to be notified was, in effect, made an actual party to the litigation by the notice, and the judgment of the court operated directly on that person's property. Notice under a nonclaim statute does not make a creditor a party to the proceeding; it merely notifies him that he may become one if he wishes.

Other state courts have summarily dismissed the notion that *Mullane* is applicable in the context of notice to creditors in probate proceedings. In two recent cases, state appellate courts have applied a more exhaustive analysis to deny application of *Mullane* to their nonclaim statutes. See *In re Estate of Fessler*, 100 Wis.2d 437, 302 N.W.2d 414 (1981); *Gano Farms, Inc. v. Estate of Kleweno*, 2 Kan. App.2d 506, 582 P.2d 742 (Kan. App. 1978). The Washington Supreme Court, faced with the same due process contention stated:

> In support of its contention that [the nonclaim statute] does not accord due process of law in that it goes no further than to require publication of notice to creditors in a newspaper, appellant cites *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. That case has no application to such a statute as [ours]. Its doctrine was applied to a case where property rights were being brought before a court for adjudication such as those of beneficiaries under trusts, and where the addresses of such beneficiaries were known to the trustee. The basis of the decision is that notice by publication alone is not sufficient to accord due process under such circumstances.

> Appellant is the victim of its own fault and nonaction by its failure to comply with a mandatory statute of nonclaim for which the courts can give it no relief. (Emphasis ours).

New York Merchandise Co. v. Stout, 43 Wash.2d 825, 264 P.2d 863, 864 (1953).

We agree with this distinction and believe that the nonclaim statute, and its potential for barring a creditor's claim, does not constitute an adjudicatory proceeding. The due process requirements of *Mullane* are not applicable to these probate proceedings. Section 473.360 is a self-executing statute of limitations. See *Rabin v. Krogsdale*, 346 S.W.2d 58 (Mo. 1961); *Clark v. Organ*, 329 S.W.2d 670 (Mo. banc 1959). The bar created by operation of a statute of limitations operates independently of any adjudicatory process. It is a legislative expression of policy that prohibits litigants from raising claims after the expiration of a given period of time. The passage of time itself destroys the right and remedy of the potential claimant. See *In re Estate of Fessler*, supra, 302 N.W.2d at 420.

(footnote omitted)

The Oklahoma probate nonclaim statute, 58 O.S. 1971 § 333, like the statutes under consideration in the Missouri case and the other cases cited, acts to cut off potential claims against the decedent's estate by the passage of time. It is the giving of notice as required by 58 O.S. 1971 § 331, which starts the time period running for the operation of the nonclaims statute.[16] Since the action of the statute upon the potential claims is nonadjudicatory in nature, we agree with the reason-

[16] *Inman v. Western National Bank of Ft. Worth*, 83 Okla. 126, 200 P. 714 (1921).

ing of the cited cases that actual notice of the potential operation of the statute of nonclaims is not required to constitute due process.[17]

The parties to this case stipulated that the personal representative of the estate of H. Everett Pope, Jr., published notice as required by 58 O.S. 1971 § 331, and that appellant failed to file the required claims within the period initiated by the filing of that notice. Upon these facts the trial court correctly ruled that the claims were barred by the operation of the nonclaims statute.

III.

Opinion and Supplemental Opinion on Rehearing of Court of Appeals, Division IV, entered in this matter are *VACATED*. Order of the trial court is *AFFIRMED*.

HARGRAVE, WILSON and SUMMERS, JJ., concur.
DOOLIN, V.C.J., dissents in Part I, concurs in Part II.
OPALA and KAUGER, JJ., concur in Part I, dissent in Part II.
SIMMS, C.J. and HODGES, J., dissent.

[17] Appellant has relied upon the case of *Continental Ins. Co. v. Mosely*, supra, note 7, to support its argument regarding the sufficiency of notice. The Supreme Court of Missouri, in *Estate of Busch*, 700 S.W.2d at 87, footnote 2, rejected the reasoning of *Continental* on grounds we find persuasive and we too reject the assertion that *Continental* necessitates a contrary result to that reached in this opinion.

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 62,204

IN THE MATTER OF THE ESTATE OF H. EVERETT POPE, JR., DECEASED.

TULSA PROFESSIONAL COLLECTION SERVICES, INC.,
Appellant,

v.

JOANNE POPE, Executrix of the Estate of H. Everett Pope, Jr.,
Appellee.

DOOLIN, V.C.J. — Concur in Part II, Dissent to Part I.

The trial court's ruling undoubtedly represents the traditional position of the Oklahoma Bar, when it requires compliance with the non-claim statute of this State, 58 O.S. 1981, §331, et seq. According to this requirement, if the claim for last illness be not presented within the time limit of the notice section, §331 "it is barred forever."

It is the position of this Claimant that the expenses of last illness are exceptions to the non-claim statutes.

We start with 58 O.S. 1981, §594 which states:

> "The executor or administrator, *as soon as he has sufficient funds in his hands*, must pay the funeral expenses, *and the expenses of the last sickness*, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this chapter, the payment has been ordered by the court." [emphasis added.]

This statute, commencing with a direct order and statement that the executor or administrator *must* pay the expenses of last illness when funds become available, is controlling as to those expenses and the final phrase, which states he is not required "to pay *any other* debt" until ordered by the Court refers to antecedent debts contracted for prior to the demise and covered by the non-claim statutes.

The legislature, on adoption of the probate code had no previously decided cases from the Dakotas or California[1] interpreting the enacted statute so there appears no impediment to a fresh or initial interpretation at this time.

Section 594 distinguishes and sets apart expenses of the "last illness" and creates a special or preferred debt status for such expenses. It speaks only of *debts*, not claims.

Title 58 O.S. 1981, §591 further specializes and differentiates between ordinary claims incurred by the decedent before demise when it fixes or sets priority in the order of payment of debts.

> §591. *Order of Payment of Debts.*
> 1. Funeral expenses.
> 2. The expenses of the last sickness.
> 3. ....
> 4. ....
> 5. ....
> 6. ....

---

[1] Historical note: The Probate Code in effect in Oklahoma may be traced from California through the Dakotas (See 1 Huff, Oklahoma Probate Law 10). The Supreme Court of South Dakota, in *Estate of Bachand*, 307 N.W.2d 140 (1981), held that a claim *must* be filed under a statute such as our §594. Although this case is persuasive, it is not necessarily controlling because its ruling comes more than 80 years after our adoption of 58 O.S. 1981, §594.

7. Demands or claims which are presented to the executor or administrator for an allowance or proved within two months after the first publication of notice to creditors.
8. . . . .

Of what purpose was the enactment of Sections 1, 2 and 7 of §591 if the act of the Legislature did not intend a special preferred debt status and special position of §594 claims, over the non-claim statutes? Was the enactment of §§594 and 591 a vain and useless action of that long-forgotten Legislature?

Also pertinent are §§311 and 312 of Title 58 in the 1981 statutes.

Section 311 lists property to be delivered to the family of the deceased as homestead, and states the surviving husband or wife is entitled to possess the homestead, as are the children if both husband and wife be deceased. The statute ends with this statement:

> "No such property shall be liable for any prior debts or claims whatever." (Thus differentiating again between debts and claims).

Title 58 O.S.A. §312 presents us with our old nemesis, "last illness" when, after increasing the property mentioned in the preceding section, (58 O.S. 1981, §311), states "there shall also be allowed and set apart to the surviving wife or husband or minor child or children of the decedent all such personal property or money as is exempt by law from levy and sale on execution . . . to be, liable *for any prior debts* or claims against the decedent, except when there are no assets thereunto available, for the payment of the necessary *EXPENSES OF HIS LAST ILLNESS*, funeral charges . . . ." [emphasis added].

Section 312 has not been heretofore interpreted, but it again gives expenses of the last illness priority, special effect, and is entitled to preferred debt status over other ordinary claims.

In 1937, we dealt with expenses of the funeral, and referred to §1258 of the 1931 statutes as being controlling. Section 1258 is now codified as 58 O.S. 1981, §594. *In Re Wagner's Estate*, 62 P.2d 1186, 1191 (Okl. 1937), quotes *Golden Gate Undertaking Co. v. Taylor*, 168 Ca. 94, 141 P. 922, 924, 52 A.L.R. (N.S.) 1152, Ann. Cas. 1915D, 742, which observed:

> "Not only, then, is the charge for funeral expenses a debt of the estate, but is a preferred debt of the first class, and is payable as soon as the executor or administrator has sufficient funds in his hands. . . ."

It is true the Oklahoma Court in *In Re Wagner's Estate* also made the distinction that a funeral claim was not one made by the decedent in his lifetime, and no claim need be filed. There is little need for this obvious distinction, for one ordinarily does not incur the expenses of one's own funeral until death. The importance of that case lies in its classification of such a §594 debt as being a preferred debt, one to be treated differently by the executor. Since the phrase "expense of last illness" directly follows the term "funeral expenses" in the statute, there is little ground for us to suppose the legislature intended that funeral expenses could be paid without a formal claim, but not so expenses of the last illness. Stated another way, the language of *Wagner's Estate* emphasized the administrator's statutory duty to pay funeral (i.e. preferred) debts out of the "first funds in his hands"; and inasmuch as both funeral expenses and expenses of last illness are undifferentiated preferred debts, there is no basis for a different rule for each.

I would find the Probate statutes, §§311, 312, 591 and 594, are special or specific acts which must control over the general statutes.[2] This maxim or rubric is one of long standing and should be grafted to and ingrained in the law of decedent's estates.

To argue that §594 does not do away with the necessity of filing a claim for expenses is to beg the question. This argument, which I take to be ill-founded, begins by accepting the desired result (that filing a claim is necessary) as fact and then uses that fact to prove the argument. Such circular reasoning is illogical and smacks of a non-sequitur and it should not, therefore, be used to decide a question of fundamental, statutory interpretation.

Lastly, the appellee's argument that a claim must be filed for payment of the expenses of last illness raises a new question even as it seeks to resolve the one before us. How, in light of the rule stated herein, are the courts to interpret and give effect to language commonly found in wills wherein the testator specifically directs the executor "to pay the expenses of my last illness and funeral"? Such clauses are as old as testaments themselves and, as long as they are not precatory in nature, should be considered valid orders by the decedent which direct payment of these preferred debts without the necessity of further action, such as the filing of a claim. To a testator attempting to put his affairs in order as he contemplates the inevitable, nothing is dearer than the assurance that he has provided, as well as he can,

[2] Where there are two statutory provisions, one of which is special and clearly includes the matter in controversy, and prescribes different rules and procedures from those in the general statute, the special statute and not the general statute applies. *Southwestern Bell Telephone Co. v. Oklahoma County Excise Board*, 618 P.2d 915 (Okl. 1980).

for proper medical care in his final days and for a decent burial. These are matters which I would not now infuse with uncertainty.

In summary, I would hold that funeral expenses and expenses of last illness are debts of a special status. We base such finding on the plain language of 58 O.S. 1981, §594 and upon the broader consideration of the importance of these services, both to the testator and to society at large. The Court of Appeals of Louisiana stated the matter very well in *Succession of Barry*, 236 So.2d 660, (La.App. 1970), when it said:

> Humanitarian considerations underlie the granting of this (preferred debt) privilege of high rank in favor of those to whom claims are due for services rendered in time of need. In the event of death, the physicians and others rendering those services are assured that their charges will not be treated as ordinary debts with less chance of payment. This obvious intent is to make it less likely that one will be deprived of much-needed service because of doubtful means of payment. [parenthetical phrase added] See also: *Wolf v. Knapp*, 103 N.W. 369 (Iowa 1905) and *In Re Hansen's Estate*, 184 P. 197 (Utah 1919).

Clearly, these are the same laudable goals embodied in our statute by the original drafters of the Oklahoma probate law, and there is a clear intent to give these two classes of debts preferred status. That this opinion comes some 79 years after statehood and after two or more generations of probate lawyers is no argument that its reasoning and its ideals are invalid. A misinterpretation of the law is no less wrong for its longevity.

The majority opinion quotes *State ex rel. Central*

State Memorial Hospital v. Reed, 493 P.2d 815, 818 (Okl. 1972).[3]

I believe the quote to be dicta for the action clause says, and as edited by West Publishing Co., its prime thrust is to establish that a state institution is subject to the same non-claim statute, 58 O.S. 1981, §331, et seq. as any other creditor.

We know from reading *Central State Hospital*, supra, that a claim was disallowed some three years after the notice to creditors had been given and an appeal was taken. We also know that a claim was based on treatment of a wife for whose care he was responsible covering a period of twelve years prior to his death. We know that claim was disallowed and that a *separate action* on *the claim* was commenced approximately three years after notice to creditors. This is not the same fact situation as in the instant case. The course of action in the case at bar is bottomed on a question of purported statutory right under 58 O.S. 1981, §594.

It is my contention that under 58 O.S. 1981, §596[4]

[3] The purpose of the nonclaim statute [58 O.S. 1981, §331] is to facilitate the handling and closing of estates. The legislature has considered the importance of this question in its amendment of the statute reducing the period of time within which the claim may be filed from four months to two months. Clearly this is an expression of the legislative concern for the expediting and disposing of administration of estates without delay.

[4] If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established or absolute, must be paid into court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over distributed as the circumstances of the state require. If any creditor whose claim has been allowed, but is not yet due, appears and assets to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered. See also, 58 O.S. 1981, §611.

this statute must be followed in the instant case for the reason there is a disputed claim (or debt) against the estate, and that the executor or administrator would be required to pay the amount of the disputed claim into court because the appeal pends. As further proof of the differences in the posture of the two cases, we note there never was a rejected claim on which an action was based under 58 O.S. 1981, §339 in the instant case.

If on the other hand a final accounting had been rendered and it had become final Sec. 596, supra, would never be triggered. The same reasoning should be our solution to the case before us today, for we know that "this estate, however, . . . is still pending and is solvent so that a delay in the expeditor's closing . . . is not an issue."[5]

I would suggest that the rule to be established by this case and for application prospectively should be: If a creditor fails to make known a disputed claim or debt under the facts and circumstances of this case by a separate action or timely objection to a final accounting then no cause of action arises under 58 O.S. 1981, §594. This cause of action is not a suit on a rejected claim, it is the equivalent of payment of funeral expenses without claim.

My holding on the issues of the necessity of filing a claim might render it unnecessary to address the second allegation of failure of notice. *Cate v. Archon Oil Co.*, 695 P.2d 1352 (Okl. 1985); *Mullane v. Central Hanover Bank*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.. 865 (1949); *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713 (Okl. 1968). Although, I strongly support these cases but believe Probate Proceedings with reference to notice grant process that is due to the parties. The authorities cited by the majority and reasoning thereof is soundly convincing.

[5] This quote is from the creditor's brief and is unchallenged by the estate.

APPENDIX B

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 10 1987
PATRICIA PATTERSON
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, March 10, 1987

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

61,399 Leonard Carl Turner v. City of Lawton, Oklahoma, a municipal corporation.
Rehearing denied.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Lavender, Opala, Wilson, Kauger, JJ.
DISSENT: Hodges, Simms, Summers, JJ.

61,467 Maria Dawson v. William Tindell, Brenda G. Tindell, Marvin Black and Green & Andress, Inc.
Rehearing denied.

62,204 In the Matter of the Estate of H. Everett Pope, Jr. Deceased.
Tulsa Professional Collection Services, Inc. v. Joanne Pope, Executrix of the Estate of H. Everett Pope, Jr.
Rehearing denied.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Lavender, Wilson, Summers, JJ.
CONCUR IN PART I; DISSENT FROM PART II: Opala, Kauger, JJ.
DISSENT: Hodges, Simms, JJ.

63,004 James W. Phares and Anne Phares, husband and wife and Raymond Phares v. Raymond Brooks d/b/a B&B Land, etc. and Canadian Valley Land Company.
Rehearing granted. Appeal reinstated on docket of Supreme Court.
CONCUR: Doolin, C.J., Hodges, Wilson, Kauger, Summers, JJ.
DISSENT: Hargrave, V.C.J., Lavender, Simms, Opala, JJ.

64,974 Robert Jones v. The Oklahoma Publishing Company d/b/a The Daily Oklahoman, The Sunday Oklahoman and formerly The Oklahoma City Times.
Certiorari denied.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Hodges, Lavender, Simms, Opala, JJ.
DISSENT: Wilson, Kauger, Summers, JJ.

65,462 Gustavo Ventura and Martha Ventura, husband and wife v. Oceanic Steamship Company, Inc.
Certiorari denied.
CONCUR: Doolin, C.J., Hodges, Lavender, Simms, Opala, Wilson, Kauger, Summers, JJ.
DISSENT: Hargrave, J.

66,092 H. J. Jeffries Truck Line and State Insurance Fund v. Raymond G. Rodgers.
Petition for certiorari dismissed.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Lavender, Simms, Opala, Wilson, Kauger, Summers, JJ.
DISSENT: Hodges, J.

CHIEF JUSTICE

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 62,204

IN THE MATTER OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED.

TULSA PROFESSIONAL COLLECTION SERVICES, INC.,
Appellant,

v.

JOANNE POPE, Executrix of the Estate of H. Everett Pope, Jr.,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Tulsa Professional Collection Services, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Oklahoma, denying rehearing, entered in this action on March 10, 1987.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

NAYLOR & WILLIAMS, INC.

By_____

Randall E. Rose, OBA #7753
David A. Tracy, OBA #10501
Counsel for Appellant
1701 South Boston Avenue
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(918) 582-8000

CERTIFICATE OF SERVICE

I, Randall E. Rose, member of the Bar of this Court, hereby certify that on the 30th day of March, 1987, a copy of the Notice of Appeal to the Supreme Court of the United States in the above entitled case was mailed, first class postage prepaid, to:

Dean H. Smith and
Phillip K. Smith
Smith & Smith
8906 E. Skelly Drive
Tulsa, Oklahoma 74129

Counsel for the Appellee herein. I further certify that all parties required to be served have been served.

_____

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Counsel for Appellant

MOTION

Supreme Court, U.S.
FILED
JUL 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1961

In The
Supreme Court of the United States
October Term, 1986

IN THE MATTER OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

TULSA PROFESSIONAL
COLLECTION SERVICES, INC.

Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

Appellee.

**ON APPEAL FROM THE
SUPREME COURT OF OKLAHOMA**

MOTION OF APPELLEE JOANNE POPE TO DISMISS OR AFFIRM

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or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Oklahoma nonclaim statute provides adequate notice under the Due Process Clause of the Fourteenth Amendment to a creditor in a probate case who has actual notice of testator's death, yet fails to file its disputed claim.

2. Whether a creditor, not having any adjudicatory rights which have arisen before the filing of a probate action, may set aside a statute which prescribes a reasonable time within which to file claims, when the debt was not listed in the probate proceeding nor acknowledged by the executrix.

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No. 86-1961

In The
Supreme Court of the United States
October Term, 1986

IN THE MATTER OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

TULSA PROFESSIONAL
COLLECTION SERVICES, INC.

Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION OF APPELLEE JOANNE POPE TO DISMISS OR AFFIRM

The Appellee, pursuant to Rule 16 (1) (b), (c) and (d), moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Oklahoma on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma appears in Appellant's appendix A to the jurisdictional statement. The opinion has not been published in the Pacific Reporter.[1]

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the constitutionality of the Oklahoma nonclaim statute, Tit. 58 Okla. Stat. Ann. § 331 through § 354, which requires creditors in a probate case to file a claim within sixty days from the date of the first publication of Notice to Creditors. The statute provides that all creditors must present their claims to the personal representative for determination of their validity within that time period or else the claims will be forever barred. The statute requires the claim to be submitted in writing with verification of the amount allegedly due and owing. The personal representative, upon receiving the claim, may allow or reject the claim.

If the claim is rejected by a judge of the district court or the personal representative, the creditor may commence an action against the personal representative, but such action must be filed within forty-five days after the claim

---

[1] The references to the opinions below which appear in the appendices to the jurisdictional statement are hereinafter cited as "App. —."

was rejected, if it then be due, or within two months after it becomes due; otherwise, the claim is forever barred.

B. The Proceedings Below

The Appellant, Tulsa Professional Collection Services, Inc., was assigned a debt owed to St. John Medical Center, Tulsa, Oklahoma, which had arisen from the expenses of last illness of H. Everett Pope, Jr., deceased. The hospital received payment in excess of $125,000.00 as payment for the last illness expense of decedent, who died in said hospital on April 2, 1979. Joanne Pope, wife of the deceased, filed her petition for Probate of Will and was appointed executrix of his estate. A Notice to Creditors was duly filed and published according to Oklahoma law. The hospital did not file a creditor's claim with the executrix, either within the sixty day period following the first publication of the Notice to Creditors or at any subsequent date. For more than four years after Mr. Pope's death, Appellant sought payment from Appellee for additional sums of money in excess of $14,000.00 which she steadfastly refused to pay on the grounds that the hospital had not actually rendered the alleged services for which payment was sought. Counsel for Appellee entered into negotiations with Appellant for settlement purposes, but never promised to pay the sum requested as counsel mistakenly avers in the jurisdictional statement. Appellant did not apply to the probate court for payment of the alleged sums until October 17, 1983.

The District Court of Tulsa County determined that Appellant was barred from the assertion of its claim by its failure to timely file a creditor's claim in accordance with the nonclaim statute. On July 23, 1985, the Okla-

homa Court of Appeals, Division IV, affirmed the trial court's ruling and rejected Appellant's contention that it should be exempted from the necessity of filing a creditor's claim for last illness expenses pursuant to Tit. 58 Okla. Stat. Ann. § 594. After the Oklahoma Court of Appeals, Division IV, denied Appellant's petition for rehearing, the Supreme Court of Oklahoma granted Appellant's Petition for Writ of Certiorari. Two questions were decided by the Supreme Court of Oklahoma: first, Appellant was found not exempt from filing a creditor's claim as required by Tit. 58 Okla. Stat. Ann. § 331, and second, the publication notice given to Appellant was found not to be in violation of the due process requirement of the Fourteenth Amendment of the Constitution of the United States.

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

The due process argument raised by Appellant for the first time after the trial Court's decision was affirmed by the Oklahoma Court of Appeals, Division IV, was only one of the two issues presented to and ruled upon by the Supreme Court of Oklahoma. Certainly that court did not evade the constitutional issue as it related to Oklahoma's nonclaim statute; moreover, the federal question was thoroughly analyzed in relation to the purposes and interests of the State of Oklahoma. To bar a creditor's

claim which is untimely filed, or not filed at all, serves a legitimate state interest of facilitating an expeditious administration of probate estates. (App. A, at 6a).

The other question presented to the state court involved a separate probate statute which contemplates payments by the personal representative to a certain class of claims of which the last illness expense was listed therein. (App. A, at 4a). The court below rejected the claim of Appellant that this statute required personal representatives to pay certain types of creditors without the necessity of compliance with the nonclaims statutes. To have held otherwise would have made a mockery of the law because personal representatives would then be forced to pay claims of last illness even in situations where, as in the instant case, there existed a bona fide dispute that the estate actually owed any amount. The construction of this statute in relation to the nonclaim provision was found to be harmonious within the statutory framework in which estates are protected from invalid, improper or frivolous claims. (App. A, at 6a). The judgment below, based upon a nonfederal ground, was adequate to support the court's finding and should not be disturbed. *Herb v. Pitcairn*, 324 U.S. 117 (1954).

Many states have rejected the interpretation that the decisions of this Court in *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950) and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) stand for the proposition that nonclaims statutes violate due process of creditors in probate matters. See *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*, 700 S.W. 2d 86, 88, 89 (Mo.1985); *In re Estate of Fessler*, 100 Wisc. 2d 437,

302 N.W. 2d 414 (1981); *Gano Farms, Inc. v. Estate of Kleweno*, 2 Kan. App. 2d 506, 582 P.2d 742 (1978); *New York Merchandise Co., Inc. v. Stout*, 43 Wash. 2d 825, 264 P.2d 863 (1953).

None of the Courts' decisions, beginning with *Mullane, supra*, and ending with *Mennonite, supra*, has held that the effect of a nonclaim statute constitutes an adjudicatory proceeding. Furthermore, the distinction in the sufficiency of the notice requirement under the Fourteenth Amendment when construing nonclaims statutes lies in the nature of the right of the person affected. The nonclaim statute operates procedurally to cut off the time for presentment of debts claimed to be owed, much like a statute of limitations. Creditors are not having their rights adjudicated; they are being given a reasonable time within which to assert their claims. It is noteworthy that the Oklahoma nonclaims provisions challenged by Appellant allow for an orderly adjudication of creditors' rights if and when they are asserted. Tit. 58 Okla. Stat. Ann. § 339 states:

> When a claim is rejected, either by the executor or administrator, or the judge of the district court, the holder may bring suit as an ancillary proceeding in the probate case or as an independent action, according to its amount, against the executor or administrator. Any proceeding or action shall be filed within forty-five (45) days after the date the claim was rejected, if it be then due, or within two (2) months after it becomes due; otherwise the claim is forever barred. If suit be brought as an ancillary proceeding, no process need be issued for service on the executor or administrator and pleadings and practice therein shall be the same as if an independent action had been brought to recover upon the claim.

It is undisputed that Appellant failed to file a claim with the estate within the time prescribed by Oklahoma law. It is also undisputed that Appellant further failed to commence an action against Appellee within the time limits of Tit. 58 Okla. Stat. Ann. § 339, supra. As stated by the Supreme Court of Washington in *New York Merchandise Co., supra*, at 864:

> Appellant is the victim of its own fault and non-action by its failure to comply with a mandatory statute of nonclaim for which the courts can give no relief.

The statute in question serves a legitimate state interest and was not intended to be a subterfuge to the deprivation of due process of law under the Fourteenth Amendment. Hence the appeal requested by Appellant does not raise a substantial federal question which merits review by this Court and should be dismissed. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902). No review should lie since the nonclaim provision is well within the range of state action allowed by the Fourteenth Amendment.

Appellant rests its whole argument upon this Court's memorandum decision in *Continental Insurance Company v. Moseley*, 463 U.S. 1202 (1983), in which this Court vacated the judgment rendered by the Nevada Supreme Court in *Continental Insurance Company v. Moseley*, 653 P.2d 158 (Nev. 1982) (Moseley I). Upon remand, the Nevada Supreme Court decided that *Mullane, supra*, and *Mennonite, supra*, required that more than service by publication was necessary in order to afford a mortgagee due process. *Continental Insurance Company v. Moseley*, 683 P.2d 20, 21 (Nev. 1984) (Moseley II). Given the facts of Moseley I, it

is readily apparent that the Appellant therein, as a mortgagee of record and a plaintiff in a civil action which was commenced prior to the filing of the petition for probate and subsequent notice to creditors, was clearly a party who had a legally protected property interest, and thus was entitled to notice reasonably calculated to apprise it of the death of the testatrix and ensuing administration of her estate. On remand, in Moseley II, the Nevada Supreme Court reversed its prior ruling and remanded to the trial court for further proceedings.

The right asserted by Appellant herein is dissimilar to those of the creditor in Moseley I in several important respects: first, the mortgagee in Moseley I, unlike Appellant herein, had an existing property interest which the nonclaim statute threatened to extinguish by operation of the element of constructive notice. Second, the mortgagee in Moseley I had commenced a lawsuit against the testatrix before her death, and thus the nonclaim statute became adjudicatory in its application to those particular circumstances. Third, in the instant case, Appellant herein had actual notice of the death of H. Everett Pope, Jr., who was in Appellant's hospital on said date of death, which further distinguishes this case from Moseley I. (App. A, at 2a).

The Appellant herein raises no substantial federal question which this Court should decide. Furthermore, the state court judgment was based on both federal and non-federal grounds. Before Appellant raised the due process argument, the three courts below ruled that state law precluded approval of Appellant's own negligence of failing to come forward with possible claims

against the estate; hence, the Supreme Court of Oklahoma was able to render its decision on adequate state grounds. The judgment of the court below should be affirmed accordingly, and the request for this Court to note probable jurisdiction should be denied.

III.

CONCLUSION

Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and since none of the grounds enumerated in Supreme Court Rule 16 justifying an appeal has been shown, Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Oklahoma.

Respectfully submitted,

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Counsel for Appellee
Joanne Pope

REPLY BRIEF

Supreme Court, U.S.
FILED
SEP 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1961

In The Supreme Court of The United States

OCTOBER TERM 1986

IN THE MATTER OF THE ESTATE OF H. EVERETT POPE, JR., DECEASED,

TULSA PROFESSIONAL COLLECTION SERVICES, INC.
Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF H. EVERETT POPE, JR., DECEASED,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

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RULE 28.1 LISTING

The parent company of Appellant, Tulsa Professional Collection Services, Inc., is St. John Medical Center in Tulsa, Oklahoma.

No. 86-1961

In The Supreme Court of The United States

OCTOBER TERM 1986

IN THE MATTER OF THE ESTATE OF H. EVERETT POPE, JR., DECEASED,

TULSA PROFESSIONAL
COLLECTION SERVICES, INC.
Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF OKLAHOMA

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

The Motion to Dismiss or Affirm filed by the Appellee in this matter draws this Court's attention to three points, two of which are void of merit and the third of which involves a mistake in application or a misapplication of the

facts in the instant case to the facts in this Court's decision in *Continental Insurance Co. vs. Moseley,* 463 U.S. 1202, 103 S.Ct. 3530, 77 L.Ed.2d 1383 (1983), (hereinafter referred to as the "*Moseley,* Memorandum Decision"). Further, the Appellee in its Motion to Dismiss or Affirm has failed to address the critical question concerning the conflict that now exists between the Nevada Supreme Court's decision in *Continental Insurance Co. vs. Moseley,* 683 P.2d 20 (Nev. 1984), (hereinafter referred to as *Moseley II)*, and the decision of the Oklahoma Supreme Court in the instant case and the Supreme Court of Missouri in *Estate of Busch vs. Ferrell-Duncan Clinic, Inc.,* 700 S.W.2d 86 (Mo. 1985).

The Appellee in the Argument portion of its Motion first raises a question of statutory construction decided by the Supreme Court of Oklahoma, in an attempt to support its argument that no substantial question has been presented to this Court. The issue of statutory construction is not, of course, before this Court and this argument thus fails completely. Appellee then cites several decisions decided by other state courts which found no due process violation in the context of a probate proceeding when the only notice given was by publication. These decisions, however, did not result in a Petition for Certiorari being granted or probable jurisdiction being noted. The only case accepted by this Court on this issue is this Court's decision in the *Moseley*, Memorandum Decision, *supra*.

In the first part of its Argument, then, the Appellee is left with only the suggestion that the statute involved was

not intended as a subterfuge to allow the deprivation of due process rights under the Fourteenth Amendment to the United States Constitution. Appellee appears to be saying that the Oklahoma legislature determined that sixty (60) days was an adequate amount of time within which to file a creditor's claim and that therefore due process is afforded to affected creditors. Clearly, the intent of the legislature in setting a time within which to file claims was to provide for the expediting and disposing of the administration of estates without delay. (App. A, at 18a, footnote 3). The Appellee has engaged in circular reasoning by setting forth the desired result, that the legislature considered due process issues and provided due process, as a fact, and then using that alleged fact in its argument that notice by publication alone to creditors of an estate is sufficient to afford notice consistent with the due process requirements of the Fourteenth Amendment. The Appellee's statement that no subterfuge to allow the denial of due process rights was intended by the legislature is correct. However, due process has still been denied.

The Appellee further asserts that the statute in question serves a legitimate state interest. As noted above, the Oklahoma legislature has determined that the expeditious disposition of the administration of estates is a reflection of the state interest involved. The Appellee attempts to use this argument to distinguish this Court's decision in the *Moseley*, Memorandum Decision, *supra*, from the case herein. The decision from which that appeal arose, *Continental In-*

surance Co. v. Moseley, 653 P.2d 158 (Nev. 1982) (hereinafter referred to as *Moseley I*), set forth arguments that are identical to the arguments urged by the Appellee herein.

In that case the Supreme Court of Nevada noted that the policy of the law of Nevada with respect to administration of estates was to provide an expeditious and comparatively unencumbered means of administering estates. The Supreme Court of Nevada further noted a balancing of interests between the heirs, devisees and legatees of the deceased and those of creditors who seek access to the assets of the estate. 653 P.2d at 160. Proceeding upon this Court's instruction in the *Moseley*, Memorandum Decision, *supra,* the Supreme Court of Nevada stated on rehearing, in *Moseley II, supra,* "[t]he issue presented by this appeal, therefore, is whether the estate's complete reliance on supplying notice by publication in these circumstances complied with the requirements of due process." 683 P.2d at 21. The Supreme Court of Nevada then determined that due process was not afforded in this matter. The Supreme Court of Oklahoma, however, upon being presented with identical argument concerning the legitimate state interest involved, determined that due process is afforded in these circumstances and further decided that this Court's ruling in the *Moseley,* Memorandum Decision, *supra,* did not apply to these identical facts, the result being a denial of Appellant's due process rights.

The Appellee then makes its third point in its Motion to Dismiss or Affirm which involves distinguishing the decision in *Moseley II, supra,* from the instant case. The first attempted distinction is that the claimant in *Moseley II, supra,* had a property interest in the estate and that the claim of the Appellant in the instant case is not a property interest. There is however an interest in property of the estate involved herein. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), requires that the members of a particular class should be protected if they do not have the ability to safeguard their interests, when there is the possibility of injury. *Mullane, supra,* 339 U.S. at 315. In this case there is not just the possibility of injury but the total loss of a claimed interest in property of the estate, when publication notice is the only method of notice to interested parties.

The second attempted distinction has to do with the alleged adjudicatory nature of the nonclaim statute. It certainly cannot be disputed that the rights of the claimant are being adjudicated. The Appellee attempts to base its argument on the fact that there is an orderly procedure for adjudication of creditor's rights when they are asserted. Obviously, if notice is not afforded the creditor will never have his rights adjudicated at all, except in the sense that his rights will be adjudicated by the operation of a statute that does not provide notice to affected parties.

Appellee's final attempt at distinguishing *Moseley II, supra,* from the instant case, is by noting that the Appellant had actual notice of the death of H. Everett Pope, Jr., thereby implying that there was no actual notice of the death

of the decedent in *Moseley II, supra.* However, *Moseley II, supra,* clearly indicates that the claimant did in fact have actual knowledge of the death of the deceased, and that the appellant in that case received actual notice to file a claim against the estate on the last day for filing claims. Thus, in *Moseley II, supra,* even though actual notice was received by the claimant, the Supreme Court of Nevada on review of the *Moseley,* Memorandum Decision, *supra,* determined on remand that the notice given was insufficient to afford due process.

Appellee concludes its argument by saying that three Oklahoma courts ruled against the Appellant. Appellee therefore reasons that the denial of the due process rights of the Appellant should not be addressed by this Court because the Supreme Court of Oklahoma was able to render its decision on adequate state grounds. Once again the argument of the Appellee is completely void of merit. Assuming the decision made by the three courts below was made on adequate state grounds does not dictate that there was no due process violation or that probable jurisdiction should be denied. The Appellee in raising this argument has interjected an issue of statutory construction as a reason for this Court to decline to hear this appeal. The issue of statutory construction is not before this Court and this argument fails completely.

Appellee again states that there is no substantial federal question. This argument must also fail. This Court has effectively noted probable jurisdiction as evidenced by the

Moseley, Memorandum Decision, *supra.* Further, since the *Moseley,* Memorandum Decision, *supra,* was rendered, at least one other state supreme court besides the Oklahoma Supreme Court has decided that the decision of the Nevada Supreme Court on remand in *Moseley II, supra,* was not correct and has thereby rejected this Court's holding in the *Moseley,* Memorandum Decision, *supra.* Both the Oklahoma Supreme Court in the instant case and the Missouri Supreme Court in *Estate of Busch, supra,* held that this Court's procedure in its consideration of the issues in the *Moseley,* Memorandum Decision, *supra,* does not indicate that this Court has held or will hold *Mullane, supra,* applicable in this kind of case. (App. A, at 11a, footnote 17 and *Estate of Busch, supra,* 700 S.W.2d at 87, footnote 2.)

The Appellee has not inadvertently failed to address the critical question concerning the conflict between the decision in *Moseley II, supra,* and the decision in the instant case by the Oklahoma Supreme Court and in the *Estate of Busch, supra,* by the Missouri Supreme Court. The holding in *Moseley II, supra,* based upon this Court's decision in the *Moseley,* Memorandum Decision, *supra,* is that notice by publication to a known creditor in a probate proceeding is not sufficient to afford due process to the creditor. The Oklahoma Supreme Court and the Missouri Supreme Court decided that this Court's decisions in *Mennonite Board of Missions vs. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) and the *Moseley,* Memorandum Decision, *supra,*

do not require more than publication notice. Notice to creditors by publication in a probate case violates the due process rights of Appellant and all persons similarly situated. The conflict existing between various state supreme court interpretations of this Court's decision in the *Moseley,* Memorandum Decision, *supra,* must be resolved. This Court must accept this matter for review to settle the issue of whether the *Moseley,* Memorandum Decision, *supra,* requires actual notice to known creditors in a probate proceeding. The need for plenary review of this matter is clearly not subject to dispute and this Court should accordingly note probable jurisdiction of this appeal.

Respectfully submitted,

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Counsel for Appellant

JOINT

APPENDIX

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1961

In The Supreme Court Of The United States

OCTOBER TERM, 1986

IN THE MATTER OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

TULSA PROFESSIONAL
COLLECTION SERVICES, INC.
Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF OKLAHOMA

JOINT APPENDIX

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Appeal filed June 5, 1987
Probable Jurisdiction Noted October 5, 1987

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The following opinion, judgment and order have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 17, 1979 July 24, 1979	Notice to Creditors published.
October 17, 1983	Appellant, Tulsa Professional Collection Services, Inc., filed an Application for Order Compelling Payment of Expenses of Last Illness in the District Court of Tulsa County, Oklahoma in Case No. P-79-687.
March 28, 1984	Order entered by the District Court of Tulsa County denying the request for an order compelling payment in Case No. P-79-687.
May 25, 1984	Appeal filed in Supreme Court of Oklahoma in Case No. 62,204.
July 9, 1984	Brief of Appellee filed in the Supreme Court of Oklahoma in Case No. 62,204.
July 17, 1984	Reply Brief of Appellant filed in Supreme Court of Oklahoma in Case No. 62,204.
July 23, 1985	Decision affirming the Trial Court decision rendered by the Court of Appeals, Division IV, State of Oklahoma in Case No. 62,204.

August 13, 1985	Appellant, Tulsa Professional Collection Services, Inc., files Petition for Rehearing of decision of Court of Appeals, Division IV, State of Oklahoma in Case No. 62,204.
October 8, 1985	Supplemental opinion on rehearing rendered by Court of Appeals, Division IV, State of Oklahoma in Case No. 62,204.
October 28, 1985	Petition for Writ of Certorari to Supreme Court of Oklahoma filed in Case No. 62,204.
November 18, 1986	Decision by Supreme Court of Oklahoma vacating Court of Appeals decision and denying a violation of Appellant's due process rights under the Fourteenth Amendment of the United States Constitution in Case No. 62,204.
December 29, 1986	Petition for Rehearing filed in Case No. 62,204.
March 10, 1987	Rehearing denied in Case No. 62,204.

I, Don E. Austin, Court Clerk, for Tulsa County, Oklahoma, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears of record in the Court Clerk's Office of Tulsa County, Oklahoma, this

APR 16 1984

Deputy

DISTRICT COURT
FILED
MAR 28 1984
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA, COUNTY

No. P 79-687

In The District Court of Tulsa County
State of Oklahoma

In The Matter of The Estate of
H. Everett Pope, Jr., deceased

CONCLUSIONS OF LAW
AND
ORDER OF THE COURT

Conclusions of Law

1. Every personal representative must, immediately after his appointment, give notice to the creditors of the deceased, . . . requiring all persons having claims against said deceased to present the same. 58 O.S. section 331

2. The Supreme Court of Oklahoma has previously

ordered a trial court to deny the personal representative authority to pay a claim of expenses of last illness, where that claim was presented pursuant to 58 O.S. section 331 and said creditor's claim was apparently proper in all respects, except it lacked a verification clause. Reed v. Charles Broadway Rouse, Inc. 50 P2d 1097, 1100 (Ok. 1935)

3. The personal representative, as soon as he has sufficient funds in his hands, must pay. . . the expenses of last sickness. . . " 58 O.S. section 594

4. The Comp. Laws of Utah 1917 section 7666 is substantially the same as 58 O.S. section 594. Under this Utah statute the Utah Supreme Court has ruled that the expenses of the last sickness of the deceased are NOT required to be presented as other claims. Under Utah law, the statute has been interpreted to REQUIRE the personal representative to pay such expenses as soon as he has sufficient funds in his hands. In re Hansen's Estate 184 P 197, 203 (Utah 1919)

5. Iowa also follows the position of Utah, that the expenses of last illness need not file a creditor's claim. Harter v. Harter 165 NW 715 (Iowa 1917); In re Skillman's Estate 125 N>W> 343 (Iowa 1910)

6. South Dakota Comp. Laws 30-21-4 is substantially the same as 58 O.S. section 594. Under this South Dakota statute the South Dakota Supreme Court has ruled that claims for last illness are not exempt from

non claims creditor's claims statutes. Matter of Estate of Bachand 307 NW2d 140,143 (S>D> 1981); 17 ALR 4th 530.

7. The purpose of the South Dakota non claims statute is to give finality to probate proceedings and to enable the personal representative of the deceased to close the estate without risk of liability for having overlooked a legitimate debt or claim. Matter of Estate of Bachand, supra at 144.

8. Likewise the Oklahoma Supreme Court has stated that the purpose of the Oklahoma non claims creditors claim statute is to facilitate the handling and closing of estates. State ex rel Central State Griffin Memorial Hospital v. Reed, supra at 818.

ORDER

This matter is a case of first impression in the State of Oklahoma. The same question has been decided by the states of Iowa and Utah in one way, and by South Dakota in another way.

Because of the Oklahoma Supreme Court's statement of the purpose of the non claims statute and the similarity of purpose that the South Dakota Supreme Court has expressed for its statute,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the Application for Order Compelling Payment of Expenses of Last Illness filed by the

assignee of the hospital is hereby DENIED.

Dated this 27th day of March 1984.

Robert D. Frank
Judge of the District Court

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing CONCLUSIONS OF LAW was mailed to:

David Tracy
1701 South Boston Avenue
Tulsa, OK 74119

Phillip Smith
3010 South 94th East Avenue
Tulsa, OK 74129

on this 27th day of March, 1983, with proper postage fully prepaid.

Sue Wemhaner
Deputy Court Clerk

EXHIBIT "A"

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
JUL 23 1985
JAMES W. PATTERSON
CLERK

No. 62,204

RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF APPEALS

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

IN THE MATTER OF THE ESTATE OF H. EVERETT POPE, JR.,
Deceased.

TULSA PROFESSIONAL COLLECTION SERVICES, INC.,
Appellant,

vs.

JOANNE POPE, Executrix of the Estate of H. Everett Pope, Jr.,
Appellee.

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

Honorable Robert D. Frank, Trial Judge

Creditor of decedent's estate appeals from the trial court's refusal to grant its request for an order compel-

ling payment of the expenses of the decedent's last illness on the basis of creditor's failure to have filed a claim against the estate. Creditor contends that 58 O.S.1981 § 594, required the executor to pay the expenses of the decedent's last illness whether or not a claim had been filed.

AFFIRMED

David A. Tracy
Randall E. Rose
Naylor & Williams, Inc.
Tulsa, Oklahoma — For Appellant

Phillip K. Smith
Smith & Smith
Tulsa, Oklahoma — For Appellee

STUBBLEFIELD, J.

The decedent, H. Everett Pope, Jr., was admitted to St. John Medical Center on November 23, 1978. After a lengthy illness, he died testate on April 2, 1979. On July 16, 1979, his will was admitted to probate, and notice to creditors was published on July 17, 1979, and July 24, 1979. Neither St. John Medical Center nor Tulsa Professional Collection Services, Inc., the assignee of St. John's claim and the appellant-creditor herein, filed a claim for the expenses of the decedent's last illness within the statutorily-prescribed time period. On October 17, 1983, Professional Collection made application for an Order Compelling Payment of the Expenses of Last Illness. The trial court denied its request on the

basis that no claim had been filed within two months of the first publication.

Creditor appeals claiming that it was not required to present a claim for a last illness expense under 58 O.S.1981 § 594. The section provides:

> The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this chapter, the payment has been ordered by the court.

The estate contends that the section establishes priority only in the case of insolvent estates and does not dispense with the requirements of filing, verification and other proof establishing the validity of the claim. They not that 58 O.S.1981 § 331, requires "[a]ll persons having claims against [the] deceased" to file a claim within two months of the date of the first publication. Title 58 O.S.1981 § 334, additionally sets forth the procedures by which the estate may be protected against invalid claims:

> Every claim which is due when presented to the administrator must be supported by the affidavit of the claimant or someone in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the claimant or affiant. If the claim be not due when presented, or be contingent, the particulars of such

> claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by claimant. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. . . .

The "nonclaim statutes" have been strictly construed so as to require the disallowance of *unverified* claims for medical services rendered during the last illness of the decedent. *Reed v. Charles Broadway Rouse, Inc.*, 174 Okla. 522, 50 P.2d 1097 (1935). Furthermore, the bar of the statute has been held to extend to claims of the state, even though the state's sovereign immunity generally prevents bar by statutes of limitation. This last result is based upon the distinction between the nonclaim statutes, which operate to destroy a debt or claim, and a statute of limitations, which is a theory of withholding remedy. *State ex rel. Central State Griffin Memorial Hospital v. Reed*, 493 P.2d 815 (Okla. 1972). The precise issue presented here, however, has not been resolved by the courts of this state. Courts of other jurisdictions have considered the matter and have reached varying results on the basis of similar statutory enactments.

Language which is substantially identical to that found in 58 O.S.1981 §§ 334 and 594, was recently interpreted by the Supreme Court of South Dakota in *Estate of Bachand*, 307 N.W.2d 140 (S.D. 1981), In rejecting a creditor's claim that the expenses of the decedent's last

illness should have been paid when sufficient funds were available notwithstanding the creditor's failure to file a claim against the estate, the court concluded that the statutory provisions for priority of payment had not relieved the creditor of its obligation to file a valid and timely claim against the estate:

> We conclude that claims for last illness are not exempt from the statutes governing content, execution and time of presentment of claims and that the priority of payment statutes assume the existence of a valid and timely claim.

Bachand, 307 N.W.2d at 143. Other states have similarly held that a provision in the will which directs payment of the expenses of the decedent's last illness does not relieve a creditor from presenting its claim to the estate within the statutorily-prescribed time period. *Rowe v. Strother*, 341 Mo. 1149, 111 S.W.2d 93 (1937); *Devers v. Schreiber*, 50 Ohio App. 443, 198 N.E. 601 (1935); *Bachand*, 307 N.W.2d at 144.

Creditor notes, however, that the courts of some other jurisdictions have dispensed with the requirement that a claim be filed against the estate for the expenses of a decedent's last illness, citing *Wolfe v. Knapp*, 127 Iowa 479, 103 N.W. 369 (1905) and *In re Hansen's Estate*, 55 Utah 23, 184 P. 197 (1919). Because Iowa's enactments are substantially dissimilar to Oklahoma's provisions, *Wolfe* offers little guidance to the resolution of the issues presented. Although *In re Hansen's Estate*

interprets provisions which are extremely similar to 58 O.S.1981 §§ 335 and 594, in a manner which is in apparent agreement with the position urged by the appellant, the case is factually dissimilar in that the claim involved was allowed and paid by the administrator, although not "presented as other claims." *Id.* at 203. In holding that the trial court improperly disallowed the claim under such circumstances, the Supreme Court of Utah observed that:

> In paying any claims, without requiring their presentation and allowance, the administrator acts at his peril; that is, he assumes the burden of proving all the facts required by the last-mentioned section [the equivalent of Section 335] to be proven to the satisfaction of the court.

Id. The court's reasoning has little applicability to cases in which an administrator has refused to pay a disputed claim.

Because of these factual or statutory dissimilarities in the cases upon which appellant relies, coupled with our belief that the interpretation argued by appellant does not further the purposes sought to be achieved by the nonclaim statutes, we are unwilling to accept the construction urged by the appellant. As was stated in *State ex rel. Central State Griffin Memorial Hospital*, 493 P.2d at 818:

> The purpose of the nonclaim statute is to facilitate the handling and closing of estates. The legislature has considered the importance of this question in its amendment of the statute reducing the period of time within which the claim may be filed from four months to two months. Clearly this is an expression of the legislative concern for the expediting and disposing of administration of estates without delay.

To exempt creditors from the requirements of the nonclaim statute merely because they are seeking to recover the expenses of the decedent's last illness could greatly complicate and/or delay the administration of an estate and would afford to physicians, hospitals, and other private individuals an exemption to which the supreme court has held even the state of Oklahoma is not entitled. *State ex rel. Central State Griffin Memorial Hospital, supra.* The construction urged by the appellant would similarly eliminate the statutory safeguards against the payment of invalid, unverified, and improper last illness claims. We do not believe that such was the intention of the legislature.

Nor do we believe that strict compliance with the statutory requirements will unduly burden individuals seeking to recover the expenses of a decedent's last illness. Such individuals should be fully aware of the decedent's name and the fact and date of his death. In that regard they are in a far better position to know of the death and any resultant probate proceedings than are many creditors who must rely solely upon publicized notices for knowledge of their debtor's death and the initiation of probate proceedings.

We accordingly conclude that individuals seeking to recover the expenses of the decedent's last illness are not exempt from the requirement that a claim be filed against the estate pursuant to the provisions of 58 O.S. 1981 §§ 331 through 354. Because the appellant-creditor failed to file a claim for the expenses of the decedent's last illness, the trial court correctly refused to grant its request for an order compelling payment by the estate, and its decision is affirmed.

BRIGHTMIRE, P. J., and RAPP, J., concur.

July 23, 1985

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
OCT 8 1985
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No. 62,204

RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF APPEALS

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

IN THE MATTER OF THE ESTATE OF H. EVERETT POPE, JR., Deceased.

TULSA PROFESSIONAL COLLECTION SERVICES, INC.
Appellant,

vs.

JOANNE POPE, Executrix of the Estate of H. Everett Pope, Jr.,
Appellee.

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

Honorable Robert D. Frank, Trial Judge

David A. Tracy
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SUPPLEMENTAL OPINION ON REHEARING

RAPP, J.

Tulsa Professional Collection Services, Inc., in its petition for rehearing, calls our attention to *Continental Insurance Co. v. Moseley*, 653 P.2d 158 (Nev. 1982) *vacated*, ____U.S.____, 103 S. Ct. 3530 (1983) *on remand*, 683 P.2d 20 (Nev. 1984), where the United States Supreme Court applied the rule enunciated in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, (1950), and reaffirmed in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, (1983), that actual notice must be provided to known creditors. The United States Supreme Court held that publication notice is not sufficient where the personal representative knows of the creditor's claim and his address.

In *Continental Insurance Co.*, the estate had knowledge of the creditor's claim and his address but did not take steps to provide notice other than statutory publication. On the final day for creditors to file claims, the complaining creditor became aware of publication notice. Consequently, his claim was filed two days beyond the statutory limit and was denied by the district court.

The creditor raised the constitutional due process issue relative to lack of notice caused by the statutory publication in the trial court and on appeal the Nevada Supreme Court affirmed the lower court's ruling. The United States Supreme Court granted certiorari, vacated and remanded. On remand, the Nevada Supreme Court held that actual notice was required because of the personal representative's knowledge of the claim.

In the present case, Appellant creditor raises the constitutional issue of notice under the due process clause for the first time on appeal. Because, however, the issue raised by Appellant is an important one, we will dispose of it notwithstanding the procedural defect. To begin, there is a total lack of evidence to support Appellant's due process notice argument. More specifically, unlike *Continental Insurance Co.*, there is no evidence in this case that Appellant did not have actual knowledge of the claim period. *Mullane* does not contemplate either vacating or nullifying a procedure upon lack of notice when actual notice in fact existed. While *Continental Insurance Co.* does have a significant impact on our law concerning notice to creditors, it does not change the outcome of this case.

For the reasons stated in the original opinion and herein, the petition for rehearing is denied.

BRIGHTMIRE, P. J., concurs, and STUBBLEFIELD, J., concurs in result.

STUBBLEFIELD, J., concurring in result

I would deny the petition for rehearing without opinion.

October 8, 1985

RELEVANT OKLAHOMA STATUTES

58 Okla. Stat. Ann. §331. Notice to creditors to present claims.

Every personal representative must, immediately after his appointment, give notice to the creditors of the deceased, unless the notice has been given by a special administrator as provided in this title, requiring all persons having claims against said deceased to present the same, with the necessary supporting documents, to such personal representative, at the place of residence or business, or at the place of business of the attorney for the personal representative, to be specified in the notice, within two (2) months from the date of the first publication of said notice; such notice must be published in some newspaper in said county once each week for two (2) consecutive weeks. Such notice shall be substantially in the following form:

All persons having claims against A B, deceased, are required to present the same with the necessary supporting documents to the undersigned personal representative at _____ within two (2) months of the date of the first publication hereof, or the same will be forever barred. Dated _____, 19____.

A B, Personal Representative

Provided, that in all proceedings wherein intestate decedent or the testator has been dead for a period of more than five (5) years prior to the commencement of

said proceeding, only one (1) month's notice to creditors shall be given; and creditors shall be required to file claims within one (1) month from the date of the first publication of said notice.

Amended by Laws 1965, c. 155, §1; Laws 1969, c. 302, §8, eff. Jan. 1, 1970; Laws 1979, c. 67, §1; Laws 1980, c. 201 §2, eff. Oct. 1, 1980; Laws 1980, c. 310, §4, eff. Oct. 1, 1980.

58 Okla. Stat. Ann. §332. Pfoof and record of notice.

After notice is given as required by the preceding section, copies thereof with the affidavit of publication must be filed in the court.

Amended by Laws 1969, c. 302, §9, eff. Jan. 1, 1970.

58 Okla. Stat. Ann. §333. Bar of claims not presented in time - Exceptions.

If a claim arising upon a contract heretofore made, be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute; if it be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the judge of the county court, that the claimant had no notice as provided in this article,[1] by reason of being out of the State, it may be presented at any time before a decree of distribution is entered; a claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged must be presented within one month

after such deficiency is ascertained. All claims arising upon contracts hereafter made, whether the same be due, not due or contingent, must be presented within the time limited in the notice; and any claim not so presented is barred forever: provided, however, that when it is made to appear by the affidavit of the claimant, as above provided, that he had no notice by reason of being out of the State, it may be presented as therein provided: provided, further, that nothing in this section, nor in this Chapter[2] contained, shall be construed to prohibit the right or limit the time of foreclosure of mortgages upon real property of decedents, but every such mortgage may be foreclosed within the time and in the mode prescribed in civil procedure, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate, unless such debt was presented as required by this code.

[1]R.L.1910, ch. 64, art. 7, now sections 331-354 of this title.
[2]R.L.1910, ch. 64, now incorporated in this title.

58 Okla. Stat. Ann. §334. Proof of claims.

Every claim which is due when presented to the administrator must be supported by the affidavit of the claimant or someone in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the claimant or affiant. If the claim be not due when presented, or be contingent,

the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by claimant. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate is insolvent, no greater rate of interest shall be allowed upon any claim, after the first publication of notice to creditors, than is allowed by law on judgments obtained in the district court.

R.L.1910, §6339.

58 Okla. Stat. Ann. §337. Allowance and rejection of claims.

When a claim accompanied by the affidavit required in this article, is presented to the executor or administrator, he must endorse thereon his allowance or rejection, with the day and date thereof. If he allowed the claim, it must be presented to the judge for his approval, who must, in the same manner, endorse upon it his allowance or rejection. If the executor or administrator, or the judge refuse or neglect to endorse such allowance or rejection for thirty (30) days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the thirtieth day; and if the presentation be made by a notary, the certificate of such notary, under seal, is prima facie evidence of such presentation and rejection. If the claim be presented to the executor

or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time.

Amended by Laws 1965, c. 206, §1.

58 Okla. Stat. Ann. §339. Suit on rejected claim.

When a claim is rejected, either by the executor or administrator, or the judge of the district court, the holder may bring suit as an ancillary proceeding in the probate case or as an independent action, according to its amount, against the executor or administrator. Any proceeding or action shall be filed within forty-five (45) days after the date the claim was rejected, if it be then due, or within two (2) months after it becomes due; otherwise the claim is forever barred. If suit be brought as an ancillary proceeding, no process need be issued for service on the executor or administrator and pleadings and practice therein shall be the same as if an independent action had been brought to recover upon the claim.

Amended by Laws 1976, c. 140, §1, eff. Oct. 1, 1976.

58 Okla. Stat. Ann. §594. When certain expenses paid.

The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, and the expenses of the last sickness, and the allowance made to the family of the decedent. He may

retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this chapter, the payment has been ordered by the court.

R.I.1910, §6450, as amended Laws 1953, p. 242, §51.

APPELLANT'S BRIEF

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1961

In The Supreme Court Of The United States

OCTOBER TERM, 1986

IN THE MATTER OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

TULSA PROFESSIONAL
COLLECTION SERVICES, INC.
Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF OKLAHOMA

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

1. Does compliance with the statutory requirements providing publication notice to creditors of the running of a two month time period within which to file claims, satisfy the due process requirements of the Fourteenth Amendment to the United States Constitution?

2. Was the publication notice provided, further made insufficient by the Executrix's actual knowledge that Appellant was a creditor of the estate?

RULE 28.1 LISTING

The Rule 28.1 Listing may be found following the QUESTIONS PRESENTED on Page i of the Jurisdictional Statement.

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No. 86-1961

In The Supreme Court Of The United States

OCTOBER TERM, 1986

IN THE MATTER OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

TULSA PROFESSIONAL
COLLECTION SERVICES, INC.
Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

OPINION BELOW

The opinion of the Supreme Court of Oklahoma is reported at 733 P.2d 396 (March 10, 1987).[1]

[1] Both in the Jurisdictional Statement and the Motion to Dismiss or Affirm it was indicated that the decision being appealed was not reported. Appellant and Appellee believed that the decision was not going to be released for publication. However, it was subsequently discovered that the opinion was published as cited herein.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on November 18, 1986. The Petition for Rehearing was denied on March 10, 1987. A Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Oklahoma on March 31, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

H. Everett Pope, Jr., was admitted to St. John Medical Center, Tulsa, Oklahoma, on or about November 23, 1978. Mr. Pope died at the hospital on or about April 2, 1979. A Petition for Probate of Will was filed June 28, 1979, and the Notice to Creditors was published for two consecutive weeks on July 17, 1979, and July 24,

1979, as required by 58 Okla. Stat. Ann. §331.[1] Payments for the expenses of last illness continued to be received from shortly after Mr. Pope's death through January 31, 1980, leaving a balance due of $14,657.55. Negotiations with Appellee for payment of the balance due began shortly thereafter with the assignor of the claim, St. John Medical Center, and negotiations continued with the Appellant, Tulsa Professional Collection Services, Inc. (hereinafter referred to as "TPCS"), and subsequently with counsel herein.

On October 17, 1983, TPCS filed an Application for Order Compelling Payment of Expenses of Last Illness in Probate Case No. P-79-687, styled In the Matter of the Estate of H. Everett Pope, Jr., deceased, in the District Court of Tulsa County, State of Oklahoma. As authority for its requested order TPCS relied on 58 Okla. Stat. Ann. §594. This seemingly mandatory statute had historically been relied on for the proposition that funeral expenses and expenses of last illness were to be paid as soon as the representative of the estate had sufficient funds on hand. However, on March 28, 1984, an order was entered by the District Court of Tulsa County denying the request for an Order Compelling Payment, on the grounds that a creditor's claim should have been filed pursuant to 58 Okla. Stat. Ann. §334. TPCS argued

[1] The complete text of the relevant sections of the Oklahoma nonclaim statutes cited may be found at J.A. 19-24.

that no such claim was required under Oklahoma law in that 58 Okla. Stat. Ann. §594 compels payment of the expenses of last illness. An appeal on this issue followed and the Trial Court's decision was affirmed, in an opinion rendered July 23, 1985, by the Court of Appeals, Division IV, State of Oklahoma, in Case No. 62,204.

Thereafter, TPCS petitioned the Court of Appeals, Division IV, for rehearing seeking review of the statutory construction issue raised. Pursuant to case law that had not been decided when the appeal process began, TPCS also alleged violation of its due process rights under the Fourteenth Amendment to the United States Constitution. Rehearing was denied. TPCS then filed a Petition for Writ of Certiorari on October 28, 1985, to the Supreme Court of Oklahoma. Certiorari was granted on December 9, 1985. The Court of Appeals decision was vacated, and the Supreme Court of Oklahoma reviewed both issues raised. In its opinion, dated November 18, 1986, it was determined that 58 Okla. Stat. Ann. §594 was not mandatory unless a creditor's claim had been timely filed. The Court further determined that the publication notice previously given was sufficient to withstand a due process challenge and that the claim of TPCS was barred. The Oklahoma Supreme Court found that this Court's opinions in *Mullane vs. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950) and *Mennonite Board of Missions vs. Adams*, 462 U.S. 791 (1983), were not applicable in the context of

providing notice to creditors in probate proceedings.

On December 29, 1986, TPCS filed a Petition for Rehearing with the Supreme Court of Oklahoma and the same was denied on March 10, 1987. On March 31, 1987, TPCS filed a Motion to Stay Issuance of Mandate and Motion to Stay Proceedings in the Supreme Court of Oklahoma, which such Motion was granted pending a resolution of the case by this Court. On March 31, 1987, TPCS also filed its Notice of Appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Oklahoma entered on March 10, 1987.

SUMMARY OF ARGUMENT

This Court has indicated through its decisions in numerous and varied situations that notice by publication is not sufficient to reasonably afford notice to interested parties. (See, *e.g.*, *Mennonite*, 462 U.S. 791, 797, and cases cited therein.) The concept of affording notice to creditors in the context of a probate proceeding has ostensibly been addressed in many states by requiring compliance with a statutory procedure of publishing notice in a newspaper of general circulation. (See, *e.g.*, 58 Okla. Stat. Ann. §331.) (J.A. 19-20). Such notice is rarely of any practical value but is still the method almost always used to afford notice to creditors in those states. However, a careful analysis of the types of statutes used to afford notice reveals a dichotomy that

separates statutes that may be constitutionally permissible from statutes having specific constitutional infirmities.

Notice and hearing statutes for creditors in a probate proceeding are currently in effect throughout the United States with claims periods varying from sixty (60) days to six (6) years. The cases interpreting these statutes, sometimes called nonclaim statutes, have as an underlying policy consideration, the quick settlement of estates, order and finality of the proceedings. The arguments offered to defeat the claim of unconstitutionality of the nonclaim statutes in various state supreme court decisions have included arguments that there is no adjudication of property rights, that no state action is involved thereby triggering the due process clause and that a nonclaim statute is a statute of limitation.

However, in *Mennonite*, 462 U.S. 791, and cases cited therein, this Court indicated that many different interests in both real and personal property are legally protected interests. This decision further held that when a proceeding will adversely affect a protected interest, such a proceeding is subject to the due process clause and publication notice to a known party is constitutionally deficient.

The question concerning whether state action is involved is dependent upon the particular statute. In the instant case, as well as in shorter term statutes of some

other jurisdictions, before *any* action can be taken to cause notice to creditors to be published, several significant actions must be taken by the probate judge, involving for example, the proving of the will, setting a hearing date on the petition and mailing notice to heirs and issuance of letters testamentary. Without these actions being taken the shorter term statutes *will never* become operative. On the other hand, statutes in effect in some other jurisdictions vary in length from one to six years. These statutes *never require any* court action or state involvement except the original enactment of the statute.

A related argument is that a nonclaim statute is a statute of limitation. A nonclaim statute and a statute of limitation have little in common other than the running of a statutory time period. Contrasting the differences between a nonclaim statute and a statute of limitation illuminates the harsh difference in application of the two types of statutes. A statute of limitation in a civil case has traditionally been considered a statute of repose that prevents the assertion of stale claims. In those states with a longer time period within which to present claims, which such period is generally one to two years, the characterization of such period as a statute of limitation is a fair one. However, in those states with a shorter time period within which to file claims, sixty days in the instant case, there is no consideration for repose and a claim certainly could not

become stale after only sixty days. Such a statute cannot be characterized, either in its application or by definition, as a statute of limitation.

Every type of notice by publication is not constitutionally deficient. However, in two cases with similar fact patterns, an analysis of the need for a better kind of notice versus the state interests involved, required that more than publication notice was necessary to the parties involved. (See, *Schroeder vs. City of New York*, 371 U.S. 208 (1962) and *New York vs. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953)). Unless vital state interests are adversely affected, a protected property right of a known creditor cannot be eliminated by court ordered implementation of a claims filing period without providing reasonable notice of that order. An analysis of the application of the short term nonclaim statute of the State of Oklahoma and its attempted notice to interested parties, weighed against the state interests involved in a probate proceeding of order, finality and quick settlement of estates, reveals that traditional notions of due process are wholly lacking and that such statutes do not provide the kind of notice contemplated and required under the due process clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

Publication notice alone to a known creditor of the running of a two month time period within which to file

claims does not satisfy the due process requirements of the Fourteenth Amendment to the United States Constitution.

The concept of notice and the opportunity to be heard was defined as a "fundamental requirement of due process in any proceeding which is to be accorded finality. . ." *Mullane vs. Central Hanover Bank and Trust Company*, 339 U.S. 306, 314 (1950). Numerous cases decided since *Mullane* have analyzed and refined this concept. In reliance on *Mullane* and its progeny, including most recently, *Mennonite Board of Missions vs. Adams*, 462 U.S. 791 (1983), several state supreme court decisions have determined that neither *Mullane* nor *Mennonite* is applicable in the context of providing notice to creditors in a probate proceeding.

The issue before the Court is whether the due process clause of the Fourteenth Amendment to the United States Constitution extends its protection to the rights of known creditors in a probate proceeding. This issue was presented to this Court in *Baker National Bank vs. Henderson*, 393 U.S. 530 (1969), wherein this Court dismissed the appeal. Several of the state supreme court decisions rendered have cited this case in support of the argument that due process is not denied when the only notice given is by publication. (*See, e.g., In re Estate of Fessler*, 100 Wis.2nd 437, 302 N.W.2d 414, 421 (1981)). These decisions have been rendered based upon argu-

ments of law that there is no adjudication of property rights; that there is no state action triggering the due process clause; and that the notice and hearing statutes, often called nonclaim statutes, are statutes of limitation. Additionally, the legitimate state interests of quick settlement of estates, order and finality of the proceedings have been cited as justification for requiring only notice by publication.

An analysis of this Court's decisions will illustrate that the concept of due process should extend to known creditors in a probate proceeding. A review of the state supreme court decisions will reveal a misinterpretation as to what constitutes property rights and a failure to distinguish whether state action is involved in the application and implementation of two groups of entirely different statutory enactments. Finally, in weighing the state interests in administering its laws against a known creditor's right to notice to present a claim, it will be evident that extension of the concept of the due process clause to known creditors in a probate proceeding falls clearly within the framework of this Court's decisions in *Mullane* and *Mennonite*.

U.S. Supreme Court Decisions

Although the United States Supreme Court has not given plenary consideration to the issue of the applicability of *Mullane* to creditors in the context of a pro-

bate proceeding, the Court has been presented with other constructive notice cases wherein this type of notice was deemed constitutionally infirm.[3] In these cases, "this Court has adhered unwaveringly to the principle announced in *Mullane*". *Mennonite*, 462 U.S. 791, 797. In line with the restrictive situations in which notice by publication alone is constitutionally sufficient, and one week after the decision in *Mennonite*, this Court in *Continental Insurance Company vs. Moseley*, 463 U.S. 1202 (1983) (*Moseley* Memorandum Decision), vacated the Nevada Supreme Court decision that publication notice was sufficient to afford due process to a known creditor making a claim in a probate proceeding. *Continental Insurance Company vs. Moseley*, 653 P.2d 158 (Nev. 1982) (*Moseley I*). The case was remanded for further consideration in light of the *Mennonite* case just then decided. On remand, the Nevada Supreme Court held that the due process requirements of *Mullane*, that

[3] *See, Mennonite*, 462 U.S. 791 (1983), wherein the Court determined that publication notice was insufficient to afford due process to an ascertainable mortgagee about a pending tax sale; *Greene vs. Lindsey*, 456 U.S. 444 (1982), wherein the Court determined that posting on premises was inadequate to inform the tenant of a forceable entry and detainer action; *Schroeder vs. City of New York*, 371 U.S. 208 (1962), wherein the Court determined that publication notice was inadequate to inform known property owners of condemnation proceedings; *Walker vs. City of Hutchinson*, 352 U.S. 112 (1956), wherein the Court determined publication notice was inadequate to inform known property owners about a proceeding in which compensation for condemned property was to be determined; and *City of New York vs. New York N.H. and H.R. Co.*, 344 U.S. 293 (1953), wherein the Court determined that publication notice was inadequate to inform known creditors of the running of a statutory time period within which to file claims in a bankruptcy estate.

were reaffirmed in *Mennonite*, applied to the type of notice required to a known creditor in a probate case. *Continental Insurance Company vs. Moseley*, 683 P.2d 20 (Nev. 1984) (*Moseley II*). The Oklahoma Supreme Court subsequently decided, in the instant case, that the Nevada Supreme Court's decision was wrong. (J.S. 11a N. 17).

Two of the cases involving publication notice that have fact patterns similar to the facts in the instant case illustrate that notice to creditors in the context of probate proceeding is a permissible and indeed warranted extension of the concept of notice due under the due process clause of the Fourteenth Amendment. Each of these cases was decided by unanimous decision and each held that publication notice was not sufficient in the circumstances presented.

New York vs. New York N.H. & N.R. Co., 344 U.S. 293, is perhaps the case that is most analogous to the instant case. In this case and in a probate case the action is commenced by the filing of a petition, which resulted in an adjudication of bankruptcy in *New York*, and a determination of death in the context of a probate proceeding. Notice to file claims was given by publication and only upon the timely filing of claims in the bankruptcy case would the claim be allowed. Notice to file claims was given by publication in the instant case and once again, only upon the timely filing of a claim would

the claim be allowed. Both proceedings then involve specific court actions before the commencement of the time period within which to file claims and after which time any such claim will be barred. *Mullane* should apply in each of these situations to require notice to known creditors that is reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and to afford them the opportunity to present objections. *Mullane*, 339 U.S. 306, 314.

If the fundamental requirement of due process is reasonable notice with the opportunity to be heard, this fundamental requirement does not exist in the context of notice to known creditors in a probate proceeding. "The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . ." *Mullane*, 339 U.S. 306, 315. This, of course, is the case unless the conditions do not permit such notice. The conditions in the instant case do permit such notice. "Where the names and post office addresses of those affected by our proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Mullane*, 339 U.S. 306, 318. A search for names and addresses of creditors is required in a bankruptcy proceeding in order to provide mailed notice. Nothing less should be required in a probate proceeding.

In *Schroeder vs. City of New York*, 371 U.S. 208, the City of New York acquired the right to divert a waterway by condemnation. A prospective injured party was required to present its claim within three (3) years or the claim was barred. The parties that would be injured by the City's action were potential plaintiffs in a then pending court proceeding. The commencement of the proceeding caused the three year period of time to begin running which would create a bar to any action if claims were not timely filed. This Court held that these potential plaintiffs were entitled to more than the publication notice provided by statute.

In the instant case, the Oklahoma Supreme Court cited the Missouri Supreme Court in *Estate of Busch vs. Ferrell-Duncan Clinic, Inc.*, 700 S.W.2d (1985), for the proposition that notice under a nonclaim statute does not make a creditor a party to the proceeding, but merely notifies him that he may become one if he wishes. (J.S. 9a). The similarities in the facts and the actions taken are striking. Both in *Schroeder*, and the instant case, a pending court proceeding will decide when notice can be published and the representative of the estate is a potential defendant in an action by the creditor, just as the City of New York was a potential defendant in the action by the injured party. In each case, without the timely filing of a claim, the claim of the potential plaintiff is barred. The potential plaintiffs in this case, *i.e.*, the creditors, had publication notice to file claims

in sixty days, while the potential plaintiff in *Schroeder* had publication notice to file claims in three years. If the potential plaintiff in *Schroeder* is entitled to more than publication notice, surely the potential plaintiff in the instant case is entitled to the same notice.

However, the series of publication notice cases cited and convenient supporting citations from this Court's decisions cannot be considered standing alone. Numerous state court decisions interpreting *Mullane* and its progeny have examined the notice issue with reference to the state interests involved, as well as various legal arguments, in an effort to determine the constitutionality of a specific notice procedure.

State Supreme Court Decisions

Since this Court's decision in *Mullane*, through 1981, at least seven state appellate courts have determined that *Mullane* did not require more than publication notice.[4] In each of these cases, an underlying consideration, whether specifically stated or not, was the state interest involved of order and finality and quick settlement of estates.

In 1982, in *Moseley I*, 653 P.2d 158, 160, the Nevada

[4] *New York Merchandise Co. vs. Stout*, 43 Wash.2d 825, 264 P.2d 863 (1953); *Chalaby vs. Driskell*, 237 Or. 245, 390 P.2d 632 (1964); *Baker National Bank vs. Henderson*, 151 Mont. 526, 445 P.2d 574 (1968); *Continental Coffee Co. vs. Estate of Clark*, 84 Nev. 208, 438 P.2d 818 (1968); *Brunel Leasing Corp. vs. Wilkins*, 11 Ariz. App. 165, 462 P.2d 858 (1969); *Gano Farms, Inc. vs. Klewene*, 2 Kan. App.2d 506, 582 P.2d 742 (1978); *In Re: Estate of Fessler*, 100 Wis.2d 437, 302 N.W.2d 414 (1981).

Supreme Court discussed the importance in providing "an expeditious and comparatively unencumbered means of accomplishing estate administration" in reaching its decision that notice by publication was sufficient to withstand a due process challenge. However, this Court vacated *Moseley I* and remanded the case for reconsideration in light of the one week old decision in *Mennonite*. On remand, having previously addressed the state interests involved, the Nevada Supreme Court determined in *Moseley II*, 683 P.2d 20, that *Mullane* and *Mennonite* applied and that due process required more than publication notice to known estate creditors. Likewise, in the instant case, the Oklahoma Supreme Court noted that the purpose of the nonclaim statute was to facilitate and expedite the handling of estates. (*See*, J.S. 5a). However, the Oklahoma Supreme Court then determined that due process had not been denied.

Since *Moseley I*, there are at least four states other than Oklahoma who have rendered decisions on this question with some of those decisions specifically including a discussion as to the state interests involved. Each of the decisions have found that neither *Mullane* nor *Mennonite* requires any better notice than that provided by publication.[5] In addition to the policy consid-

[5] *Estate of Busch vs. Ferrell-Duncan Clinic*, 700 S.W.2d 86 (Mo. 1985); *Gibbs vs. Estate of Dolan*, 146 Ill. App.3d 203, 496 N.E.2d 1126 (1986); *Coley vs. Estate of Odom*, 500 So.2d 188 (Fla. Appl 1 Dist. 1986); and *Matter of Estate of Madden*, 729 P.2d 464 (Kan. App. 1986), *Affd.* 736 P.2d 940 (Kan. 1987).

eration discussed, both in cases before *Moseley I* and in cases since, several legal arguments have also been proposed as justification for not providing more than publication notice. The arguments used in these state supreme court decisions to defeat a claim of unconstitutionality of the particular statute have included; that there is no adjudication of property rights involved; that no state action is involved thereby triggering the due process clause; and that nonclaim statutes are statutes of limitation. However, upon close examination these arguments fail.

A creditor's claim to an asset of an estate would clearly be a protected property right according to *Mullane*. In *Mullane*, this Court determined that a cause of action by trust beneficiaries to have a trustee account for the handling of their interests is certainly a proceeding "in which they may be deprived of property rights and hence notice of hearing must measure up to the standard of due process." 339 U.S. 306, 313. Indeed it can be argued that all interests in real and personal property are protected by and subject to the requirements of the due process clause. In *Goss vs. Lopez*, 419 U.S. 565 (1975), this Court held that a student's public education is a property interest which is protected by the due process clause. In *Memphis Light, Gas and Water Div. vs. Kraft*, 436 U.S. 1 (1978), this Court determined that continued utility service was a protected property interest during the time a disputed bill remains

unpaid. In *Mennonite*, this Court held a mortgagee's lien was not extinguished by a tax sale where the only notice given was by publication. *Mennonite*, 462 U.S. 791. (*Also, see*, cases cited at 797.) A debt owed to an estate is surely as much a property right as is a trustee's obligation to provide an accounting or a debt owed in a bankruptcy matter.

The argument that no state action is involved that would trigger the due process clause of the Fourteenth Amendment has been used as the foundation of some of the decisions supporting the constitutionality of notice by publication statutes. However, there is a critical difference between what are actually two types of statutes with two different events causing the statutes to become operative. Certain of these statutes only become operative on the death of the deceased. Significantly, those statutes that become operative upon the death of the deceased involve the implementation of statutory periods of generally one to two years.[6] In those states with the longer statutory time period the only state action involved is that of the legislature's earlier statutory enactment.

[6] Ark. Stat. Ann. §62-2601(d) (1971) five years; Ill. Rev. Stat. ch. 110 ½, §18-12(b) (1978) three years; Ind. Code Ann. §29-1-14-1(d) (1983) one year; Iowa Code Ann. §633.413 (West 1964) five years; Kan. Stat. Ann. §59-2239(1) (1978) nine months; Ky. Rev. Stat. §396.025 (1984) three years; Mich. Comp. Laws Ann. §700.735 (West 1980) six years; Mo. Ann. Stat. §473.360(3) (1984) three years; N.H. Rev. Stat. Ann. §556.29 (1974) two years; N.C. Gen. Stat. §28A-19-3(f) (1984) three years; Or. Rev. Stat. §115.005(4) (1983) three years.

In the second type of statute there are two groups of states. In one group are those states with shorter term statutes that become operative only upon the appointment of a personal representative for the estate and the issuance of letters.[7] In the second group are those states with shorter term statutes that only become operative on publication of notice.[8] The time periods involved in these two groups of states run from sixty days to six months. Each of these shorter term statutes involve a great deal more than the simple enactment of the statute into law. The statutory scheme involved requires significant state action with a number of specific acts required by the probate judge, ending with issuance of letters or issuance of letters followed by publication of

[7] Ala. Code §43-2-350 (1982) six months; Cal. Prob. Code §700(a) (1984) four months); Del. Code Ann. tit. 12, §2102(a) (1979) six months; Ill. Rev. Stat. Ch. 110 ½, §§ 18-3,-12 (1978) six months; Md. Est. & Trusts Code Ann. §§8-103,-104 (1974) six months; N.H. Rev. Statn. Ann. §556.3 (1974) six months; and Wis. Stat. Ann. §859.05 (1984-85) three months from court order fixing time for barring claims.

[8] Ark. Stat. Ann. §62-2601(a) (1971) six months; D.C. Code Ann. §20-903 (a)(1) (1981) six months; Fla. Stat. Ann. §733-701 (1983) three months; Ind. Code Ann. §29-1-14-1 (1983) three months; Kan. Stat. Ann. §59-2239(1) (1983) six months; Miss. Code Ann. §91-7-151 (1984) ninety days; Mo. Rev. Stat. §473.033 (1978) six months; Nev. Rev. Stat. §§145.060, 147.040 (1979) sixty days. If an estate value does not exceed $100,000; ninety days in all other cases; 58 Okla. Stat. Ann. §331 (1986) two months; S.C. Code Ann. §21-15-640 (1976) five months; Tenn. Code Ann. §30-2-310 (1984) six months; Vt. Stat. Ann. Tit. 14 §1203(a)(1) (1984) four months.

notice to creditors.[9] Indeed, without state action the statute *cannot* become operative. Thus, the argument that the due process clause is not triggered because there is no state action must fail.

Most of the relevant decisions have claimed that nonclaim statutes are statutes of limitation. As a result of the foregoing distinction between the shorter and longer term statutes, this argument must be examined with reference to each of the two groups of statutes. A nonclaim statute and a true statute of limitation have little in common other than the running of a statutory time period. Statutes of limitation in civil cases have been defined as statutes of repose.[10] Such statutes have further been characterized as statutes to prevent the assertion of stale claims. In those statutes with a longer period of time within which to file claims, the characterization of a one to two year period of time as a statute

[9] *E.g.*, in Oklahoma, each of the following must take place before notice is given. Tit. 58 Okla. Stat. Ann. §22 provides that any party interested in an estate may petition the court having jurisdiction to have the will proven. Section 25 provides that after the petition is filed a hearing date on said petition will be fixed. Section 26 provides that copies of the notice of the time set for the probate of the will are sent to the heirs, legatees and devisees. Section 101 provides that upon admission of a will to probate the Court may issue letters testamentary. Section 110 provides that the order is made by the State of Oklahoma and is witnessed by the Judge of the County Court with the seal of the court affixed thereto. Finally, and only after each of these steps are followed and a personal representative is appointed, notice to creditors is given pursuant to §331 thereby causing the claim period to begin running.

[10] Black's Law Dictionary, 5th Ed. (1979).

of limitation is a fair one. The concept of affording repose for a claim and yet providing for the prevention of stale claims is reasonably and fairly addressed. However, in those states with a period of time within which to file claims that is two months, as in the instant case, there is no consideration at all for the idea of repose for claims. Further, a statute with a two month filing period is without question not a statute concerned with the prevention of presentation of stale claims since the passage of a two month time period is not enough time for a claim to become stale.

Texaco, Inc. vs. Short, 454 U.S. 516 (1982), has been cited as authority for the proposition that a nonclaim statute is a "self-executing" statute of limitation that does not require any notice other than notice by publication. However, nonclaim statutes with a two month time period within which to file claims do not meet the definition of a statute of limitation whose purpose it is to afford both repose for claims and to preclude stale claims. Further, in *Texaco, Inc.*, the statute is clearly self-executing, with notice having been provided by an earlier enactment of the state legislature. The shorter term notice and hearing statute involved herein only begins to run after the entry of a number of specific court orders ending with the issuance of letters or issuance of letters followed by publication notice. (*See*, Notes 7 and 8, *supra*). Unlike a longer term notice and hearing

statute whose effect, and perhaps whose purpose, is to afford both repose for claims and preclude stale claims, the shorter term notice and hearing statutes completely ignore these factors and reflect exclusively on the policy considerations of order and finality of the proceedings and quick settlement of the estate without regard to reasonable notice as it applies to a creditor of an estate.

A notice and hearing statute such as the one involved in the instant case cannot be labeled a statute of limitation by definition because it fails the definitional element of being a statute of repose and because a two month filing period cannot pretend to have as a purpose preclusion of stale claims. Further, unlike a longer term notice and hearing statute, which would allow a creditor a one to two year period in most states to discover a death and to file a claim, the only consideration involved in the shorter term notice and hearing statutes is quick settlement of the estate with no regard whatsoever of fairness to the claimant, *i.e.*, notice and the opportunity to be heard.

Application of Rule of Notice by Publication

A single example involving a common fact pattern illustrates the unfairness and inadequacy of the notice provided by a short term notice and hearing statute such as the one in the instant case. Upon the death of one spouse, the surviving spouse petitions the court to

open a probate case. A hearing date on the petition is set. Copies of the notice of hearing are sent to the heirs. Letters are issued. A notice to creditors is published. The attorney for the estate of course has the obligation to advise the representative of the estate of the relevant statutes in probate matters. The representative is advised that if creditors do not present claims within two months the claims are barred. Certainly this personal representative, who is also the surviving spouse and beneficiary of a statutory percentage of the estate, would not take the initiative to seek out creditors. In fact from the point of view of this personal representative it would be in his or her best interest to avoid all contact with creditors until the time period for filing claims had run, thereby avoiding payment of the debt.

If the personal representative did not already have enough incentive to take this action as soon after death as possible, the representative of the estate under Oklahoma law has only two months after his appointment to give notice to creditors or his letters will be revoked.[11] Having been advised by the attorney that all claims will be barred that are not presented in two months, the estate representative, aware of a $100,000 obligation to Creditor, publishes the notice required and has no communication with Creditor. This obligation, which was secured by personal property of the deceased, was payable in quarterly installments. The deceased

[11] 58 Okla. Stat. Ann. §352.

made several timely payments and changed the county of his residence. He made one quarterly payment after the move and died. Creditor does not realize that anything is wrong until after his claim against the estate has been barred by the nonclaim statute. The next payment of course has not yet become due.

If Creditor had taken the opportunity to secure a mortgage on real property his mortgage would have been preserved, although he is still deprived of any deficiency because of his failure to file a claim. However, Creditor did not secure a mortgage on real property and has now been deprived of the entire balance due and owing as well as being deprived of his right to foreclose on the personal property that secured the indebtedness. Even in a state with a six month notice and hearing statute the creditor would not necessarily take immediate action after only one missed payment and might still find himself without a claim.

Assuming some additional facts further draws into question the efficacy of a shorter term notice and hearing statute. If Creditor regularly read the legal newspapers of the deceased's prior residence he would not even then be able to discover either the death of the deceased or that a notice to creditors had been published. Even if Creditor discovered the change of residence and the death of the deceased, he would then have to determine where to search for information relating to presentation of creditors claims. In Oklahoma,

any legal newspaper published in the county can be used to publish the notice required.[12] In order to be fully protected then, Creditor should subscribe to *every* publication that can be defined as a legal newspaper in every county in the United States to which he might believe the debtor would move and monitor every notice to creditors published every day in order to determine whether a particular deceased is a debtor of Creditor.

In today's mobile society with debtors continuously changing residences and with creditors who often operate not only throughout a state but throughout a portion or the entirety of the United States, notice by publication is insufficient.

> Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. *Mullane*, 339 U.S. 306, 320.

If this statement was accurate in 1950, it is certainly no less accurate today. It would appear then that without question due process is denied when a known credi-

[12] 25 Okla. Stat. Ann. §106 provides that a legal newspaper of the county is defined as follows: (1) a publication that is maintained paid general subscription circulation to the county; (2) that has been admitted to the United States Mails as paid 2nd class mail matter; and (3) that has been continuously and uninterruptedly published in the county for 104 consecutive weeks immediately prior to the first publication of the notice. Further, 25 Okla. Stat. Ann. §105 provides that the newspaper to be used may be designated by the party or the attorney.

tor has not been given notice and an opportunity to be heard.

In this Court's decision in *Mennonite*, the dissent expresses concern that the balancing test used in *Mullane* might be in jeopardy because of its view that the majority was devising a formula to achieve a balance between competing interests. *Mennonite*, 462 U.S. 799, 801-802. However, balancing the interests involved, if the integrity of the state interest involved can be protected, a better notice than that required by publication would be required for a known creditor. Thus, whether due process is denied is a function of whether the application of a different rule, *i.e.*, a better notice than that provided by publication, defeats or adversely affects legitimate state interests in administering its laws.

Application of Rule of Notice by Mailing

If due process requires the opportunity to be heard then "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. 306, 315. Thus, when a state elects to provide a long period of time within which to file claims, such an election meets the test of the means employed being reasonable. This type of statute can legitimately be called a statute of limitation. If affords a period of repose for the presentation of claims and during such time practically every

claim that might be made could come to the attention of the possible claimant and thereby afford an opportunity to present the claim. This of course is the case without the necessity of providing a better kind of notice than is provided by publication. At the same time, stale claims are precluded upon the running of the statutory time period. Further, this type of statute is "self-executing" as contemplated by this Court in *Texaco, Inc.*, 454 U.S. 516. The only court or state involvement is in the original enactment of the statute as law. A longer term statute such as this should not require a better notice than is provided by publication.

However, in a notice and hearing statute of a two month duration, as in the instant case, the only state interest being protected is that of quick settlement of the estate with no regard for the rights of possible claimants. Further, this shorter term notice and hearing statute affords no repose for presentation of claims and because of the short time period does not allow the possibility of a claim becoming stale. Requiring an additional kind of notice, by mailing, would allow the state to retain its primary and perhaps sole interest in providing the short notice, quick settlement of estates, but at the same time would afford notice and the opportunity to be heard. The steps that would be necessary for the state to insure that they were not denying the due process rights of a prospective claimant would be to have the state require, through the probate court judge, that

the representative of the estate exercise due diligence in discovering creditors and notifying them. It would of course be necessary to have a due diligence requirement because without such a requirement it would be surprising if the representative of the estate did not avoid all contact with creditors in order to maximize the amount of property to be distributed to himself and/or to the heirs.

It is possible to use even the short term nonclaim statute in effect in Oklahoma, which shares the distinction of being the shortest term statutory scheme in effect in the United States, and still require mailed notice. The representative of the estate, exercising due diligence, could, within the two month time period from appointment by which time notice to creditors must be given,[13] conduct a search of the deceased's home, office, safe deposit box, books and records, as well as monitoring mail received. The personal representative could further make inquiry of the deceased's relatives, friends and professional advisors, to identify creditors. A personal representative of the estate will of course perform most of these duties in any event when searching for assets to prepare an inventory and in general when administering the estate. The names of creditors thus discovered could have notice mailed directly to them and the published notice that is already required would serve as notice to unknown creditors whose identity the representative of the estate could not reasonably ascertain. *Mullane* clearly recognizes that both unknown persons and those persons whose interests are either conjectural or future may not in due course of business come to the knowledge of the person making the inquiry. Thus, the publication notice is sufficient as to this kind of creditor. *Mullane*, 339 U.S. 306, 317. This additional duty would of course have no effect on the state interests of order, finality and quick settlement of estates.

[13] *See*, 58 Okla. Stat. Ann. §352.

Imposing this additional duty would, however, increase the burden on the representative of the estate. The actual discovery of the identity of the creditors would of course take some additional time, but would not be oppressive or burdensome. The preparation of the notice, in Oklahoma, is handled by the attorney for the estate, who also coordinates through the court clerk's office the publication of the notice. The mailing of the notice would most probably be handled by the attorney also.

Further, in order to encourage due diligence as well as to protect the representative of the estate from an unintentional oversight and to protect the estate from fraudulent acts of an unscrupulous personal representative, a bond, that is required in some cases anyway, would be necessary in most cases. Although this would be an additional cost, which should be borne by the estate, this would be proportionately the same on most

estates, since the cost would be determined by the size of the estate available for distribution. In any event, this additional burden on the representative and the estate is not a significant burden when weighed against the enormous administrative and financial burden facing a creditor in trying to maintain knowledge of the residence, death, and the publishing of a notice to creditors of every debtor of the creditor in every legal newspaper available.

It might also be suggested that providing a better notice to creditors would adversely affect quick settlement of the estates by promoting litigation. It would be true that litigation would be promoted if a person with a questionable claim went forward with the pursuit of such claim where they may not otherwise have pursued the claim without having received the notice. However, it would be difficult for the state to justify the failure to provide notice because of the possibility of a contested action, as any such attempt at justification would surely be characterized as an arbitrary one and one not reasonably related to the state interest involved. If publication notice was insufficient in *New York*, 344 U.S. 293, and *Schroeder*, 371 U.S. 208, publication notice is insufficient in the instant case. In any situation where due process is afforded, there is the possibility of a claim being made. Due process should not be denied to those with valid claims because of the possibility of litigation if an invalid claim is presented.

In *Mennonite* this Court said "[n]otice by mail or other means as certain to insure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable". *Mennonite*, 462 U.S. 791, 800. If this is the holding, the notice provided in the instant case fails absolutely. If, as pointed out in the dissent in *Mennonite*, the focus of the due process inquiry should be the effect of a notice procedure on "a particular *class* of cases", (citing *Greene vs. Lindsey*, 456 U.S. 444, 451), the effect on this class of cases is to almost completely eliminate any possibility of notice being provided. (*See, Mennonite*, 462 U.S. 791, 803). If, as further pointed out in the dissent in *Mennonite*, the question is the unexpected nature of the action taken, clearly, in probate cases, the death of the deceased and the subsequent publication of notice is not something that could be expected any more than a condemnation hearing, a bankruptcy proceeding, or an accounting of trust funds. (*See, Mennonite*, 462 U.S. 791, 807).

The criterion established by *Mullane*, is not just the possibility of conceivable injury, but the character of the requirements having reference to the subject with which the statute deals. (*See, Mennonite*, 462 U.S. 799, 803). It is therefore reasonable to question the character of the requirement authorizing notice solely by publica-

tion to known creditors in probate proceeding. Since there is no adverse impact on a state's interest in providing a better type of notice in a short term nonclaim statute, it is reasonable to require that notice. The right to receive notice and the opportunity to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. 306, 314. Notice by publication to a known creditor in the context of a probate proceeding clearly "has little reality or worth" and is not a reasonable method of notice to be employed by the state in furtherance of its stated interests and objectives. Notice by mailing to a known creditor in a probate proceeding is practical and reasonable and is a proper extension of the concept of due process as contemplated by this court in *Mullane* and *Mennonite*.

CONCLUSION

The judgment of the Supreme Court of Oklahoma, insofar as it upheld the constitutionality of the challenged statute should be reversed.

Respectfully submitted,

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BRIEF

(5)

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Supreme Court of the United States

October Term, 1986

IN THE MATTER OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED.

TULSA PROFESSIONAL
COLLECTION SERVICES, INC.,

Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

Appellee.

**ON APPEAL FROM THE
SUPREME COURT OF OKLAHOMA**

BRIEF OF APPELLEE

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QUESTIONS PRESENTED

1. Whether the Oklahoma nonclaim statute provides adequate notice under the Due Process Clause of the Fourteenth Amendment to a creditor in a probate case, which has actual notice of testator's death, yet fails to file its disputed claim.

2. Whether a creditor whose alleged claim is cut off by a statute of limitation was entitled to more than publication notice where the executrix had no knowledge of the claim.

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No. 86-1961

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BRIEF OF APPELLEE

STATEMENT

The decedent, H. Everett Pope, Jr., was admitted to St. John Medical Center (hereinafter referred to as Hospital-Creditor) in Tulsa, Oklahoma, on November 23, 1978. He died in that hospital on April 2, 1979. On July 16, 1979,

decedent's will was admitted to probate in the District Court of Tulsa County, Oklahoma. The wife of decedent, Joanne Pope, was appointed personal representative of the estate and pursuant to state law published notice to creditors on July 17, 1979, and July 24, 1979.[1] The Hospital-Creditor did not choose to file a creditor's claim with the executrix within the statutory period or on any subsequent date. Furthermore, the hospital did not file a creditor's claim with the probate court. Approximately four and one-half years after decedent's death, Hospital-Creditor sought to collect from the estate a sum in excess of $14,000.00 allegedly due and owing which the executrix refused to pay or even acknowledge as valid, for the reason that she had no knowledge of any claim on behalf of Hospital-Creditor until more than a year after her husband's death. Hospital-Creditor received payments from Mr. Pope's insurance carrier in excess of $125,000.00.

On October 17, 1983, Hospital-Creditor filed its "Application for Order Compelling Payment of Expenses of Last Illness" with the District Court of Tulsa County on the grounds that, since the claim was one for expenses of last illness, state law required the executrix to pay the debt whether or not a creditor's claim had been filed.[2]

Initially, the Hospital-Creditor did not raise the constitutional issue of improper notice; therefore, a trial of the evidentiary factual matters relating to the notice question did not occur. The trial court ruled that the creditor was barred from receiving payment by its failure to properly submit a claim.[3] Hospital-Creditor appealed to the

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1 The Oklahoma nonclaims statutes are reproduced in the Joint Appendix (J.A.) at 19-23.

2 See Tit. 58 Okla. Stat. Ann. 1971 § 594 in J.A. 23-24.

3 J.A. at 3-6.

Oklahoma Court of Appeals which affirmed the trial court's ruling.[4]

Hospital-Creditor, for the first time, in its petition for re-hearing to the Oklahoma Court of Appeals, raised the due process issue now before the Court. However, the Oklahoma Court of Appeals again denied the contention and the cause went up to the Supreme Court of Oklahoma for decision of the following questions: First, was Hospital-Creditor exempt from filing a creditor's claim as required under the nonclaims statute and second, was the publication notice given to Appellant proper under the due process requirement of the Fourteenth Amendment to the Constitution of the United States. The opinion of the Supreme Court of Oklahoma relied on widespread authority that the issues concerning due process and notice present in *Mullane v. Central Hanover Bank and Trust Company,* 339 U.S. 306 (1950), and *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983), were not applicable to this case and therefore affirmed the holding in favor of the executrix. (See Jurisdictional Statement, p. 2A). Hospital-Creditor now brings this appeal for decision by this Court.

SUMMARY OF ARGUMENT

In *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950), Justice Jackson, writing for the Court, stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but

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4 J.A. at 7-14.

there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* at 313.

Indeed, the controversies have continued to abound in the last thirty-seven years since *Mullane;* however, issues regarding what process is due have been refined and molded to address the rights of individuals in various contexts. The issue before the Court concerns notice by publication to a class of potential creditors advising them to present claims, if any they have, so that the claims may be paid if properly due, or rejected, if found to be frivolous or void.

Historically, before parties are entitled to more than publication notice, they must first have a recognizable and established interest in property which is in danger of being adversely affected or taken. Furthermore, due process dictates before a court adjudicates the rights of those individuals, they must be given an opportunity for a hearing on the matter. However, this Court has reasoned that publication notice does satisfy due process standards when a statute of limitations acts to cut off potential claims, whether they be valid or not, by failure of the adversely affected party to take action. *Texaco, Inc. v. Short,* 454 U.S. 516 (1982). Each type of case involving notice issues must be examined in light of the peculiar nature of the purpose of the statute and its affect on all the citizens.

The *Mullane* factual setting is far removed from the case now before the Court. Those beneficiaries of trust funds who were found entitled to actual notice had an existing adjudicated property interest which was being administered by an institutional trustee. The trustee knew

of their interests and had means by which to provide actual notice of the judicial settlement. The beneficiaries were not in a position to know of the settlement date; unless, by mere chance they discovered it by word of mouth, or actually saw the publication itself and associated the facts with their trust interests. In our case, the Hospital-Creditor is a professional health care provider in business for profit. The decedent died while in its care, and it had actual knowledge of his death. Entities such as this are presumed to be knowledgeable about laws relating to their business, e.g., tax laws, negligence and the like. It is reasonable to presume a knowledge of the provisions of state probate law in relation to presentation of creditors' claims.

Since *Mullane,* many courts have held the notice requirements in that case inapplicable in various probate disputes.[5] In regard to nonclaims statutes, these courts ruled that as statutes of limitations, it was reasonable to require creditors to stay abreast of the debtors-decedents status in light of legislative policy of orderly and expeditious handling of probate estates. In *Continental Insurance Company v. Moseley,* 653 P. 2d 158 (Nev. 1982) (hereinafter referred to as *Moseley I*), the court was asked to find the nonclaims statute lacking under *Mullane* guidelines. The court barred the claim and upheld that statute. This Court in a per curiam opinion remanded the case back to be considered "in light of *Mennonite Board of Missions v. Adams,* 462 U.S. 799 (1983) . . ." *Continental Insurance Company v. Moseley,* 463 U.S. 1202 (1983) (hereinafter referred to as *Moseley II*).

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[5] See e.g. *Baker National Bank v. Henderson,* 445 P.2d 574 (Mont. 1968), Appeal dismissed, 393 U.S. 530 (1969).

The Nevada Supreme Court then reversed its earlier ruling in *Moseley I* and held that claimant was denied due process under *Mullane* and *Mennonite* upon two factual grounds: the executrix had actual notice of its claim and claimant had been listed by name in the executrix's petition for summary administration. *Continental Insurance Company v. Moseley*, 683 P. 2d 20 (Nev. 1984) (hereinafter referred to as *Moseley III*).

Even if the outcome of *Moseley III* is correct, the crucial facts of this case are so dissimilar in relation thereto so as to require a different result. In this case, to require an executrix to provide actual notice to all creditors, even those whose alleged claims she was unaware of, is not reasonable and impedes, rather than promotes, the ideas of fairness under the Fourteenth Amendment to the United States Constitution. The Oklahoma nonclaims statutes which grant potential creditors certain time limits to present claims is extremely similar, if not identical, to statutes of limitation and should be upheld under the standards of reasonableness set forth in *Texaco, Inc.*

When applied to the factual circumstances of this case, the Oklahoma nonclaims statute is compatible with due process standards and serves a reasonable state interest. To overturn it would cause grave problems, not only in legislative sessions, but in the orderly and efficient administration of decedents' estates in every state in the land. Furthermore, personal representatives, heirs, devisees and legatees would risk perils of unnecessary litigation and be at the mercy of a small minority of creditors whose potential claims were unknown at the time of commencement of probate. The more reasonable result is to find a presumption that creditors such as Hospital-Creditor be familiar

with long-standing statutes which have an impact on their business affairs.

ARGUMENT

In a probate proceeding, notice by publication to unknown creditors is adequate under due process standards of the Fourteenth Amendment to the United States Constitution.

In the long line of cases brought before the Court involving sufficient notice to interested parties as required by the due process clause of the Fourteenth Amendment, a common thread can be found. That thread is notice of an impending judicial action which often results in the taking of property from an individual. Examples of some types of property interests involved in these cases are beneficiaries' interest in trust funds in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), to land condemnation proceedings in *Schroeder v. City of New York*, 371 U.S. 208 (1962) and mortgagees' recorded interests in real property in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983).

The parties aggrieved by a lack of proper notice in these cases were similar in another respect—they all had a recognized, valid interest in tangible property. As the merits of their claims were litigated, both sides of the cases understood and admitted that the claimant alleging improper notice had, at some moment in time, a genuine ownership of interest in property, usually real property. Some have attempted to extend the privilege of receiving actual notice to parties whose rights to ownership in property have terminated because they failed to affirmatively act to

preserve their ownership. The case of *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) demonstrated that statutes of limitations may, by operation of law, cause one to lose a mineral interest for failure to periodically file a recorded statement of ownership. Both the majority and the dissenting members of the Court agreed that *Mullane* notice was inapplicable to statutes of limitations. *Texaco, Inc.* at 536, 551.

Hospital-Creditor argues conversely that based on the decision of the Nevada Supreme Court in *Moseley III*, creditors in probate proceedings are entitled to the same notice as was mandated in *Mullane* and *Mennonite*. Going further, Hospital-Creditor intimates that "all interests in real and personal property are protected by the subject to the requirements of the due process clause."[6] The language in *Mullane* stated that due process notice requirements depended on "all the circumstances". That case has not been uniformly interpreted to apply to any potential claim of an alleged creditor. What the Court has done is to carefully balance the interests of all parties involved to determine whether the notice given is reasonable. The reasonableness of the Oklahoma nonclaims statute and its notice provisions will be evident when examined in light of the legislative purposes and policy considerations of the law, the peculiar effect of requiring actual notice to unknown creditors in probate cases and the unique facts of this case.

After Mullane, What Notice is Due?

Mullane involved notice given to beneficiaries of various trust funds administered by the trustee, who was petitioning for judicial settlement of the accounts. The trustee, acting according to New York law, simply published the notice in a local newspaper. The beneficiaries, some of whom were not residents of the state of New York, challenged the notice provision on due process grounds, since the end result of the judicial approval of the accounting would have deprived the beneficiaries of any recourse against the malfeasance of the trustee in handling their funds. At a glance, it appears that beneficiaries of a trust fund are much like creditors in a probate case who are raising objections to nonclaims statutes based on inadequate notice. However, crucial differences exist between the two which cause opposite, yet sound dispositions. Inherently, the Court determined that the beneficiaries who were entitled to actual notice were those who had an identifiable interest in the trust funds because these persons were in a position to possibly lose property if the accounts had been mishandled. And, if the Trustee had received court approval of any negligent accounting, those persons who lost property would have, in effect, no recourse against the trustee as a result of the judicial action. Second, not every potential beneficiary was accorded relief of actual notice. Justice Stevens, writing for the Court, stated that means of publication notice satisfied the due process standards regarding:

> "... those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee. Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved, we think them unnecessary." *Mullane* at 317.

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[6] Appellant's Brief 17.

Significantly, *Mullane* did not involve a statute of limitation.

For the next thirty years after *Mullane* several state courts held the same notice requirements were not applicable to various probate proceedings.[7] In 1982, the Nevada Supreme Court reaffirmed its holding in *Continental Coffee Co. v. Estate of Clark*, 438 P. 2d 818 (Nev. 1968) that *Mullane* did not require actual notice, i. e. by mail, to a decedent's known creditors. *Moseley I*. The appellant in *Moseley I*, Continental Ins. Co., had a pending civil action against Oliver, the decedent, which had commenced before the time of his death. The personal representative of Oliver's estate published the notice to creditors pursuant to state law. Continental Ins. Co. then filed its claim with the estate one day after the period for filing claims had expired. The state court upheld the statute which barred the claim and rejected appellant's contention that *Mullane* notice should have been given. However, the United States Supreme Court vacated and remanded *Moseley I* in a per curiam opinion.[8] The Nevada Supreme Court, on remand,

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[7] *In re Estate of Pierce*, 60 N.W. 2d 894 (Iowa 1953); *Haas v. Haas*, 504 S.W. 2d 44 (Mo. 1973), appeal dismissed 417 U.S. 928 (1974); *New York Merchandise Co. v. Stout*, 264 P. 2d 863 (Wash. 1953); *Chalaby v. Driskell*, 390 P. 2d 632 (Ore. 1964); *Baker National Bank v. Henderson*, 445 P. 2d 574 (Mont. 1963); *Continental Coffee Co. v. Estate of Clark*, 438 P. 2d 818 (Nev. 1968); *Brunell Leasing Corp. v. Wilkins*, 462 P. 2d 858 (Ariz. 1969); *Gano Farms, Inc. v. Kleweno*, 582 P. 2d 742 (Kan. App. 1978); *In re Estate of Fessler*, 302 N.W. 2d 414 (Wis. 1981); *Williams v. Grossman*, 293 N. W. 2d 315 (Mich. 1980).

[8] "On petition for writ of certiorari to the Supreme Court of Nevada. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court

(Continued on following page)

reversed its *Moseley I* decision, holding that both *Mullane* and *Mennonite* required better notice than service by publication to a known creditor. *Moseley III*.

The state court in *Moseley III* relied heavily on *Mennonite* to justify the reversal of its earlier finding in *Moseley I*. *Mennonite* involved an Indiana statute which provided that each year there should be a public auction sale by the County Auditor of realty that had been tax delinquent for 15 months.[9] The County Auditor was required to provide notice in three different manners, to-wit: posting; publication of notice for three consecutive weeks; and notice by certified mail to the last known owner of record.[10] It is noteworthy that mortgagees of record were not required to be given notice by certified mail. After the auditor sold the property, those individuals with interest in the realty could redeem it within a two year statutory period by matching the purchase price paid by the purchaser plus any delinquent taxes. However, after the redemption period had run, the individual who had purchased the property at the tax sale was eligible to apply for a deed which would give him fee simple title, free and clear of prior liens or encumbrances.[11] Once the purchaser secured the deed he could then quiet the title to the property.

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of Nevada for further consideration in light of *Mennonite Board of Missions v. Adams*, 462 U.S. 799, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983)." *Moseley II*.

[9] *Mennonite* at 791, 792-793.

[10] *Id.* at 793.

[11] *Id.* at 794.

In *Mennonite*, Adams was a purchaser who commenced a quiet title action which was contested by a mortgagee of record, Mennonite Board of Missions (hereinafter referred to as MBM). The Indiana trial and appellate courts ruled against MBM on the basis that it was not entitled to the same type of notice required in *Mullane*, but this Court rendered an opinion by Justice Marshall that the Indiana notice provisions were lacking under due process standards and that the case be reversed in favor of MBM.[12]

The Nonclaims Statute Operates as a Statute of Limitations

Like *Mullane*, *Mennonite* involved two important factual aspects which should be noted in light of this case. First, the interest held by MBM was a validly recorded mortgage instrument. Second, the case did not involve a statute of limitations *per se*, but rather a newly enacted state statute which contained a two year grace period. Accordingly, since *Moseley III*, appellate courts of at least five states, including Oklahoma, have considered the question of notice required in *Mullane* and *Mennonite* and have uniformly held, notwithstanding *Moseley III*, that *Mullane* does not invalidate nonclaims statutes which rely on publication to bar alleged probate creditors.[13]

These cases consistently found that because of the nature of the nonclaims statutes as statutes of limitations, *Mullane* notice does not apply and in reliance cite *Texaco,*

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[12] *Id.* at 795 to 800.

[13] *Estate of Bush v. Ferrell-Duncan Clinic*, 700 S.W. 2d 86 (Mo. 1985); *Gibbs v. Estate of Dolan*, 496 N.E. 2d 1126 (1986); *Coley v. Estate of Odom*, 500 So. 2d 188 (Fla. App. 1 Dist. 1986); *Matter of Estate of Madden*, 729 P. 2d 464 (Kan. App. 1986), Affd. 736 P. 2d 940 (Kan. 1987).

Inc. v. Short, 454 U.S. 516. This line of cases finds *Texaco, Inc.* and *Mullane* compatible in the validation of nonclaims statutes which rely upon publication to trigger a shortened nonclaim period.[14]

The traditional nonclaims statute is a statute of limitations, very similar to the common form probate statute of the State of Washington that the Court upheld in *Farrell v. O'Brien*, 199 U.S. 89 (1905), in which the decision of the Court specifically relies on a statute of limitations argument. *Farrell* at 116-118.

Statutes of limitations and statutes giving *Mullane* notice to litigants are fundamentally different in the function which each is designed to perform. A statute of limitations presupposes claimants who know that they have claims and it seeks to bar the assertion of stale ones. On the other hand, the statute requiring Mullane notice of the commencement of suit presupposes known parties who cannot be expected to know of the action about to take place. Given the underlying premise of limitations statutes, it is quite improper for application to the factual situations in *Mullane* and *Mennonite* both of which involved known, indispensible parties to judicial proceedings, held to adjudicate the property interests of individuals who are probably unaware of those proceedings.

By way of example, assuming the statute in *Mullane* permitting common trust fund trustees to receive settlement of their accounts after notice by publication to known

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[14] See e.g., Tit. 58 Okla. Stat. Ann. § 331 (J.A. 19-23).

beneficiaries had been re-cast as a statute of limitations, it would have been nonetheless faulty under Fourteenth Amendment scrutiny. The argument put forth under these assumed set of circumstances would be that the beneficiaries would be barred from challenging the trustee's accounting four months after the accounting had been filed in court and notice published in a local paper, instead of making the beneficiaries parties to the trust accounting proceeding. Therefore, the beneficiaries' rights under those assumed facts would be cut off by operation of the statute of limitations trigger, as opposed to the judicial order. It would be unlikely that the outcome would have been different on review by this Court. However, this Court could have invalidated the statute under the reasoning of *Texaco, Inc.*, wherein the majority opinion stated that a legislature must afford affected persons a "reasonable opportunity" to familiarize themselves with the statute of limitations and to comply with it. *Texaco, Inc.*, 454 U.S. 516, 531-533. In *Texaco, Inc.*, the two year period within which to become familiarized with the statute of limitations and to comply with it was found to be reasonable. Borrowing from *North Laramie Land Company v. Hoffman*, 268 U.S. 276, 283, (1925), Justice Stevens speaking for the Court in *Texaco, Inc.*, stated:

> "It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control of disposition of such property." *Texaco, Inc.* at 532.

Furthermore, the Court allowed room for discretion on behalf of the Indiana legislative body, and supreme court of that state, to find that the two year period was sufficient

time to allow property owners to become familiar with the statute and take any action they deemed necessary.[15]

The Hospital-Creditor in this case has not plead ignorance of the Oklahoma nonclaims statute, nor would it be likely that such a plea would be embraced by the Court. Hospitals and similar astute creditors are viewed as professional, profit-seeking entities; moreover, a major portion of that profit is gained by shrewd bill collecting. The presumption follows that when a hospital has patients who die within its rooms daily, it behooves them to keep track of any means possible to receive proper compensation for services rendered. Indeed, one author has discovered that creditors in a case such as this do not even use the probate claims process, either to learn of the debts of

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[15] "A legislative body is in a far better position than a court to form a correct judgment concerning the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice.

In short, both the Indiana legislature and the Indiana Supreme Court conclude that a 2-year period is sufficient to allow property owners in the state to familiarize themselves with the terms of the statute and to take any action deemed appropriate to protect existing interests. On the basis of the records in these two proceedings, we cannot conclude that the statute was so unprecedented and so unlikely to come to the attention of citizens reasonably attentive to the enactment of laws affecting their rights that this 2-year period was constitutionally inadequate. We refuse to displace hastily the judgment of the legislature and to conclude that a legitimate exercise of state legislative power is invalid because citizens might not have been aware of the requirements of the law." *Texaco, Inc.* at 532-533.

their debtors, or to secure payment through the filing of claims.[16]

There are many reasons why creditors would not rely on the probate process for payment of their indebtedness.[17] Therefore, the evidence that creditors of decedents learn of their deaths and that all but a few secure payment outside

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[16] Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108 (1984) at 1120 says: "without mounting a systematic empirical study, I have tried to inquire broadly among credit officers and credit information specialists and their lawyers. Among those I interviewed, I found unanimity both on the central proposition that probate plays an inconsequential role in the collection of decedents' debts, and on the reasons why."

[17] *Id.* Langbein lists six of the following reasons:

1. The vast majority of decedents' debts are paid quickly and voluntarily by the survivors and creditors rely primarily upon information supplied by survivors for knowledge that the debtors are deceased. *Ibid.* at 1122.
2. Health care indebtedness is normally paid through health insurance and, of course, health care providers will know of patient death. *Id.* at 1121-1122.
3. If survivors do not pay, creditors commonly hire bill collectors to badger them into doing so.
4. Some creditors make extensive use of credit life insurance, payable directly to the creditor which satisfied any claims against decedents or their estates. *Id.* at 1122-1123.
5. Creditors who finance "big ticket" purchases such as automobiles rely upon security interests to collect from decedents' estates or survivors with resulting deficiencies being "relatively rare". *Id.* at 1123.
6. The probate process of filing claims and securing payment through adjudications, if necessary, is too costly for general use—collection costs would promise to exceed recoveries and creditors who were owed "debts of several thousand dollars" were prepared to file claims if necessary. *Id.* at 1123.

of the probate claims process is certainly important to the notice question in this case. For if only a few creditors make use of the process, it seems more reasonable to ask those few to take the position of learning of debtor deaths and filing claims than to require personal representatives of estates to notify all creditors, few of whom will file claims anyway.

The Reasonableness of Nonclaims Statutes in Probate Matters

Baker National Bank v. Henderson, 454 P. 2d 574 (Mont. 1968), a case like this one, involved the failure of a bank to file its creditor's claim within the statutory period which resulted in the barring of its claim. The bank had made a loan to Henderson, decedent, and received an unsecured promissory note in return. The term of the note made it due and payable December 15, 1966; however, Henderson died on September 25, 1966, and his administratrix-wife proceeded, according to state law, to publish notice to creditors. The nonclaims statute barred claims which were not presented within four months after the first publication of notice to creditors, and without explanation, the bank failed to present their claim to the estate until March 25, 1967, six months after decedent's death. The trial court granted the Motion for Summary Judgment in favor of the administratrix and the Montana Supreme Court affirmed that decision. Refusing to find the case similar to *Mullane*, the Montana Supreme Court found it inconceivable that the banking institution could not claim it was unaware of the death of the debtor, and, at the same time, attempt to use the due process argument to make up for their own negligence. *Baker* at 576. A subsequent appeal to this Court was dismissed for want of a substantial fed-

eral question. *Baker National Bank v. Henderson,* 393 U.S. 530 (1969).

The purpose of the Oklahoma nonclaims statute was set forth in the proceeding below stating with support the case of *State ex rel. Central State Griffin Memorial Hospital v. Reed,* 493 P. 2d 815, 818 (Okla. 1972) where it is stated:

> "The purpose of the nonclaims statutes [58 O.S. 1971 Sec. 333] is to facilitate the handling and closing of estates. The legislature has considered the importance of this question in its amendment of the statute reducing the period of time within which the claim may be filed from four months to two months. Clearly, this is an expression of the legislative concern for the expediting and disposing of administration of estates without delay." Jurisdictional Statement at 5a.

Oklahoma is not unique in this respect. Nonclaims statutes exist in more than 40 states.[18] Application of the Oklahoma nonclaims statute is not arbitrary. Provisions of Oklahoma's nonclaim version reveals sensible exceptions to the general rule which prevent harsh application to creditors whose claims are contingent or not due at the time specified in the notice.[19] For example, those types of claims may be presented within one month after they become due or absolute.[20] A second exception is provided for those creditors who were out of the state when the notice was given. These creditors may present their claims any time before the decree of distribution is entered.[21] A claim for a deficiency

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18 Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?* 63 N. Car. L. Rev. 659 (1985) at 660 n. 7.

19 Tit. 58 Okla. Stat. Ann. § 333, found in J.S. at 20-21.

20 *Id.*

21 *Id.*

from the sale of mortgaged estate property must be presented within one month after the deficiency is ascertained. The statute prescribes no time limit for filing mortgage foreclosure actions against real property of decedents.[22]

Nonclaims statutes have continued to be found reasonable in light of the decisions of *Mennonite* and *Mullane.* The legislative policy coupled with judicial approval from the states indicates an overriding social interest to expeditiously administer probate and administration proceedings. While the argument to provide notice by mailing to all creditors seems to smack of fairness at first blush, there exist inherent hazards if this duty is imposed. Once the mandate issues that personal representatives are to provide actual notice to all creditors, known or unknown, the personal representative will be subjected to claims of creditors who fail to properly file to protect their interest, but surface months or years later. Those creditors will quote from the Fourteenth Amendment and state that they did not receive actual notice, and thus are entitled to their due process. Besides reducing the dwindling number of qualified personal representatives agreeing to act under such a chaotic condition, there is the additional danger that heirs, devisees and legatees will also be subject to potential claims of potential creditors. If appellant Hospital-Creditor's argument is accepted—which says all interests in real and personal property are subject to the requirements of actual notice under the due process clause—then *Texaco, Inc.,* must be reversed because even the dissenting opinion by Justice Brennan states that:

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22 *Id.*

"The very interest asserted by the State in imposing a statute of limitations—avoiding trial of stale claims—would be defeated by extending the time in which the plaintiff may bring his suit until such time as he may learn of the existence of the statute or the fact that it may soon run. In addition, with respect to statutes of limitations, pre-expiration notice is, as a practical matter, impossible: the potential defendant may not be aware of the potential plaintiff's injury, let alone the plaintiff's future intention to sue. Under these circumstances, the potential defendant cannot be expected to monitor the law on behalf of his future—perhaps unknown—adversary. In sum, a state need not make provision for notice with respect to the retroactive application of a statute where it would defeat a legitimate state interest, or would be infeasible in the context of the statutory scheme." *Texaco, Inc.*, 454 U.S. 516 at 551.

Does the holding in *Mosely III* compel the Court to grant relief to appellant herein? It has never been established in this case that the estate owes any money whatsoever to the Hospital-Creditor. The record is devoid of any evidence that the executrix knew of a claim on behalf of Hospital-Creditor against the estate. However, the record is quite clear that Hospital-Creditor had actual knowledge of the death of decedent, inasmuch as he died in their building. The record is clear that when the Hospital-Creditor presented the executrix with an alleged bill, she disputed the validity and refused to pay. The record is clear that the Hospital-Creditor made no attempt to collect the alleged bill with the probate court until more than four years after the first notice to creditors was published. Thus, the factual setting in this case sharply contrasts with the facts in *Moseley III*.

This comes at a time when there is a national trend to streamline the probate process, particularly under the efforts of the Uniform Probate Code (U.P.C.) by requiring less formal judicial proceedings in the handling of probate and administration of estates.[23] A holding that the personal representative and the probate court become heavily involved in notifying and adjudicating potential creditors' claims would seriously undermine the progress achieved in those states adopting the U.P.C.

Hospital-Creditor relies heavily on *Schroeder v. City of New York*, 371 U.S. 208 (1962) and *New York v. New York N.H. and H.R. Co.*, 344 U.S. 293 (1953). Schroeder involved a state action to condemn land owned by the plaintiff who clearly did not receive the process which was due under the Fourteenth Amendment, since notice by publication was the sole method used by the state. The controlling facts in *Schroeder* as distinguished from this case are that the landowner was having her property taken by the municipality of New York for diversion of a river under the authority of the New York City Water Supply Act which only required notice by publication and posting. Furthermore, the landowner was not in a position to know of the condemnation proceedings, a judicial process. The *Schroeder* case simply does not provide the basis for the analogy to a probate proceeding such as exists here.

And, in the *City of New York v. New York N.H. and H.R. Co.*, the question involved reorganization of a railroad under the bankruptcy act in which known creditors were not given proper notice causing them to fail to file their lien claims. Likewise, the facts of *New York N.H. and H.R. Co.* are unlike this probate case in that it is basically an issue involving lienholder rights to real property. The railroad, which had filed for reorganization under § 77

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[23] U.P.C. § 3-803 - § 3-810, 8 U.L.A. 354-375 (1983).

of the Bankruptcy Act, knew of the City's liens on its real property; the railroad mailed notice to some creditors who had inferior liens to the City; and the railroad was seeking a declaratory judgment that the City's liens were "forever barred, void and unenforceable". *New York N.H. and H.R. Co.* at 294. Indeed, it is difficult to find anything factually similar to this case except both involve alleged due process infringement. Clearly, the legislative policy and concerns of probate matters are far removed from these types of proceedings.

Under the guidelines of *Texaco, Inc.*, it is certainly reasonable to allow state legislatures and courts to establish nonclaims statutes and interpret them as statutes of limitations. It is reasonable to apply a relatively short statute of limitations to claims against a deceased debtor in a probate proceeding. It is reasonable to require unsecured creditors to learn of debtor deaths, acquaint themselves with the state statutes regarding pursuit of potential claims against estate and to file claims, if they so choose. It is reasonable to require such action on the part of creditors, especially if the vast majority of them do not even use the probate claims process, either to learn of the deaths of the debtors, or, to secure payment through the filing of claims. Finally, it is certainly reasonable to allow the personal representatives of the estates to execute their oath of office and expeditiously administer the assets to the heirs, devisees and legatees, without fear of future reprisal from potential creditors, who possess potential claims, after the final decree and discharge are entered. Requiring the personal representative to extend actual notice to all unknown creditors is a dangerous precedent which would wreak havoc in all the states which have established orderly and expeditious procedures for handling probate matters.

CONCLUSION

The judgment of the Oklahoma Supreme Court should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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No. 86-1961

In The Supreme Court Of The United States

OCTOBER TERM, 1986

IN THE MATTER OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,

TULSA PROFESSIONAL
COLLECTION SERVICES, INC.
Appellant,

vs.

JOANNE POPE, EXECUTRIX OF THE ESTATE OF
H. EVERETT POPE, JR., DECEASED,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF OKLAHOMA

REPLY BRIEF OF APPELLANT

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RULE 28.1 LISTING

The Rule 28.1 Listing may be found following the QUESTIONS PRESENTED on Page i of the Jurisdictional Statement.

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In The Supreme Court Of The United States

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IN THE MATTER OF THE ESTATE OF
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REPLY BRIEF OF APPELLANT

IN A PROCEEDING WHEREIN ACTION IS TAKEN THAT WILL EXTINGUISH A PROPERTY RIGHT, A BETTER NOTICE THAN THAT PROVIDED BY PUBLICATION MUST BE GIVEN WHEN LEGITIMATE STATE INTERESTS WILL NOT BE AD-

VERSELY AFFECTED BY PROVIDING SUCH NOTICE.

In its Summary of Argument the Estate proposes three reasons not to grant the relief requested by Appellant (hereinafter "TPCS"). Its first argument is that it is reasonable to assume that the hospital should be knowledgeable concerning probate law. The point is well taken. The hospital and TPCS relied on 58 Okla. Stat. Ann. §594 in support of its application for Order Compelling Payment of Expenses of Last Illness. This statute had historically been relied upon by the hospital herein and other health care providers since the statute became effective in 1910. Until the Oklahoma Supreme Court entered its decision on the issue of statutory construction of 58 Okla. Stat. Ann. §594 and 58 Okla. Stat. Ann. §334, both the hospital and TPCS, as well as other health care providers, had relied upon this law as their assurance of being paid for expenses of last illnesses as provided by this apparently mandatory statute. Until the final decision of the Oklahoma Supreme Court there was no reason to believe otherwise.

The second argument offered by the Estate as a reason to deny the relief requested by TPCS is that the instant case and the decision in *Continental Insurance Company vs. Moseley*, 683 P.2d 20 (Nev. 1984), involved facts that are so dissimilar as to require the different decisions rendered. However, the Estate gives no indication as to which facts are dissimilar. This argument ends

with a conclusion that the statute involved herein "is extremely similar, if not identical, to statutes of limitation and should be upheld under the standards of reasonableness as set forth in *Texaco, Inc.*" (Estate's Brief, page 6). The brief of the Estate fails to identify any similarity between the statute in this case and that in *Texaco, Inc. vs. Short*, 454 U.S. 516 (1982), much less establish the two statutes as identical.

Finally, the Estate suggests that to rule that the statute in question is unconstitutional would create chaos in the administration of estates. However, the Estate has failed to make any reference to the methods proposed by TPCS for dealing with any problems that might arise if a better kind of notice than publication notice was required.

In the Argument portion of its brief the Estate begins by suggesting that a better kind of notice than that provided by publication is only necessary when an interest in tangible property is involved. There is then an attempt to relate this argument to this Court's decision in *Texaco, Inc.* However, both cases cited by TPCS and cases cited in *Texaco, Inc.*, clearly involve interests in property other than tangible property.[1]

After a review of the decision in *Continental Insurance*

[1] *See, e.g., Goss vs. Lopez*, 419 U.S. 565 (1975); *Memphis Light, Gas & Water Div. vs. Kraft*, 436 U.S. 1 (1978), cited by TPCS in its brief and cited in *Texaco, Inc.* at 796; as well as this Court's decision in *New York vs. New York, N.H. and H.R. Co.*, 344 U.S. 293 (1953)

Company vs. Moseley, 683 P.2d 20, and its reliance on *Mennonite Board of Missions vs. Adams,* 462 U.S. 791 (1983), the Estate suggests that post-*Mennonite* cases have based their decisions on this Court's decision in *Texaco, Inc.* and further suggests that the decision in *Texaco, Inc.*, dictates that all nonclaim statutes are statutes of limitation, regardless of the duration of the claim period. It is difficult to imagine a greater dissimilarity in cases than that in *Texaco, Inc.*, and the instant case. In *Texaco, Inc.*, after twenty years of nonuse of a property right and after the expiration of a two year grace period within which to validate a claim, a claimed interest would be extinguished. In the instant case, there is a sixty day period within which to validate a claim that only begins to run after several steps have been taken by the probate judge ending with a notice to creditors being giving by publication[2] in any legal newspaper of the county.[3]

In a situation involving a statute of limitation, such as in *Texaco, Inc.*, a party is charged with knowing the law and consequently the limitation period within which to validate a claim. This is deemed constitutionally acceptable because the two year period has been determined to be an adequate amount of time within which to discover the limitation period and validate a claim.

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[2]See, Appellant's Brief, p.20, note 9.

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[3]See, Appellant's Brief, p. 25, note 12.

In the context of a nonclaim statute, wherein notice by publication is the only required notice and the claim period is only sixty days, a creditor should subscribe to every publication that can be defined as a legal newspaper in every county to which he might believe the debtor would move and monitor every notice to creditors published every day in order to have the opportunity to validate a claim within the sixty day period.

The Estate next makes reference to a case cited as *O'Callaghan vs. O'Brien* and also cited as *Farrell vs. O'Brien* in the Official Reporter. 199 U.S. 89 (1905). The issue in this case was whether a failure to give notice to heirs deprived the heirs of due process rights. The decision rendered was that there was no due process deprivation. However, there was also in effect a separate statutory period of one year within which to contest the probate. The Court held that full and adequate probate remedies were available for use by the adversely affected parties and their rights were thereby protected. This case is of course more similar to *Texaco, Inc.*, than the instant case and it therefore offers no support for the argument urged by the Estate.

The Estate has narrowly limited its inquiry as to the reasonableness of the challenged statute to hospital creditors where the death occurs in the hospital. The inquiry should of course be directed to the interests and claims of all creditors who must depend on publication notice. Reference is made in the Estate's Brief at p. 16

to an article,[4] the conclusions of which must be questioned, on the basis of the material quoted. in Footnote 16 of the Estate's brief, the article cited begins with the statement that it is not a systematic empirical study, but rather an inquiry made by the author of the article concerning the use creditors make of the probate process in collecting claims. The article is therefore of little help in determining the applicability of the conclusions drawn by the author to the instant case. Indeed, if no notice is given concerning the availability of the process, it would not be surprising to discover that the process was used sparingly.

The brief of the Estate ends with a discussion of the reasonableness of nonclaim statutes in probate matters. In its discussion of *Baker National Bank vs. Henderson*, 454 P.2d 574 (Mont. 1968), the Estate paraphrases some, but not all, of the facts set forth in the case. Although, as noted by the estate, the Montana Supreme Court states that it was inconceivable that the bank was unaware of the death of the debtor and therefore should not be allowed to use the due process argument to make up for its negligence, the decision becomes more clear when presented with all the facts. In *Baker*, although a claim was not filed within the time required by statute, it was noted by the Court that the decedent lived in a town of 1,759 people with two financial institutions ser-

[4]Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108 (1984).

ving the town. It was concluded that the decedent was a man of considerable stature because of the size of an unsecured loan made to him. Further, there was one newspaper in the county and it was the publisher of all legal publications in the county. These additional facts make *Baker* starkly different from the factual situation presented in the instant case.

The Estate next seeks to justify the application of the statute involved herein by noting some exceptions to the general rule. A further justification is attempted in reciting the interests in expeditious administration of estates. The exceptions provided by statute have no application in the instant case and the interest in expeditious administration of estates has been conceded by TPCS. The Estate follows its attempted justification of the statute with a listing of some possible hazards if notice by mailing is required. However, the Estate expresses these hazards in terms of actual notice being required to all claimants, known or unknown, and the endless possibilities of claims being made for months or years after the closing of the estate.

This resolution was of course not suggested by TPCS nor is it required by *Mullane vs. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950). Reasonable inquiry and due diligence would cause the vast majority of possible claimants to come to the attention of the personal representative of the estate. The publication notice that is already required would serve as notice to a

creditor whose identity the representative of the estate could not reasonably ascertain. *Mullane* clearly recognizes that those with conjectural or future interests may not in due course of business come to the attention of the person making the inquiry and that publication notice to this class of creditors would be sufficient. *Mullane*, 339 U.S. 306, 317.

At this point in its brief the Estate alleges facts that are intended to distinguish the instant case from *Continental Insurance Co. vs. Moseley*, 683 P.2d 20. The first alleged fact is that it has not been established that any money is owed to TPCS. The statement is then made that the record is devoid of any evidence that the Executrix knew of a claim. However, the record is equally devoid of any evidence that the Executrix does not owe any money to TPCS or that the Executrix did not know of the claim. Surely the Estate would not suggest to the Court that the deceased was in the hospital from November 23, 1978 to April 2, 1979, and yet did not know that the hospital would have a claim for a hospital stay in excess of five months.

Further, the Estate suggests that the record is clear that when presented with the bill the Executrix disputed the validity and refused to pay the same. However, the *only fact of record* concerning any of the above alleged facts is that both parties disputed the amount of the net balance due that was attributable to

the decedent's last illness[1]. There is no statement of record that the validity of the bill itself was disputed. Additionally, the record is not clear, as alleged by the Estate, that no attempt to collect the bill was made until four years after the notice to creditors was published. The only fact of record in this regard is that it was more than four years before the application of TPCS for an Order Compelling Payment of Expenses of Last Illness was filed. There is no evidence or statement of record as to what conversations or negotiations took place during that period between the representative of the Estate and the hospital, its assignee, TPCS, or the attorneys of record eventually retained herein.

Eliminating each of these alleged facts of record leaves the instant case in the same posture as *Continental Insurance Company vs. Moseley*, 683 P.2d 20, and not a factual setting sharply in contrast as suggested by the Estate in its brief.

If there is a national trend to streamline the probate process by requiring less formal judicial proceedings as suggested by the Estate, the resolution of the instant case would be to eliminate the shorter term nonclaim statutes in favor of the longer term nonclaim statutes, whose operation requires no judicial proceeding or intervention. TPCS has not suggested that the only alternative or resolution to the problem presented is notice

[1]See, J. S. at 2a.

by mailing to creditors. Clearly, a traditional statute of limitation, as is in effect in the states listed in Appellant's Brief at page 18, Note 6, is constitutionally sufficient because there is a reasonable period of time provided for a claim to come to the attention of a creditor and after which he should not be heard to complain that he did not have enough time to discover the existence of a claim and validate the same.

The Estate attempts to distinguish *Schroeder* vs. *City of New York*, 371 U.S. 208 (1962) by saying the claimant-landowner was not in a position to know of the condemnation proceedings, *i.e.*, a judicial process. This factor does not distinguish the instant case and *Schroeder*. Clearly the claimants in a probate case are not in a position to know of the probate proceedings and the publication notice to creditors also only comes into effect as a result of a judicial process.

The Estate attempts to distinguish the *City of New York* vs. *New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953) by saying that this case involved lienholder rights to real property and is thus fundamentally different from the instant case. However, a close reading of the case shows that Section 77(b) of the Bankruptcy Act of 1898 defined "creditor", as all holders of claims of whatever character against the debtor or its property. *New York, N.H. & H.R. Co.*, 344 U.S. 293, 295. The Estate suggests that it is difficult to find anything factually similar between the instant case and *New York, N.H. & H.R. Co.*

However, it is clear that although the City of New York was a lienholder, it was by definition a creditor and the requirement of better than publication notice was to be extended to all creditors, *i.e.*, to all holders of claims of whatever character. Additionally, current bankruptcy rules carry over this requirement and provide in Bankruptcy Rule 3002(c) that notice for filing claims is given by mail by the clerk, setting a ninety day period within which to file claims, which statutory period begins to run on the first date set for the first meeting of creditors.

The Estate concludes its brief by saying that *Texaco, Inc.*, stands for the proposition that state legislatures may establish nonclaim statutes of any duration without regard to reasonableness and then call them statutes of limitation to make them reasonable under the guidelines of *Texaco, Inc.* TPCS is not suggesting that any person with any claim should be able to present the same forever from the date of death forward, nor has TPCS suggested, as set forth by the Estate, that a personal representative must extend actual notice to all unknown creditors.

TPCS has suggested and urges the Court to require a better kind of notice than is provided by publication in a short term nonclaim statute such as the one in the instant case. The brief of TPCS specifically states the kind of notice that would be required to both known and unknown creditors, while still utilizing the two month

time period of the statute in question, thereby preserving the considerations of order, finality and quick settlement of estates. Alternatively, the shorter term nonclaim statute could be eliminated in favor of the longer term statutes. The constitutionality of one and two year nonclaim statutes that run from the date of death cannot be seriously questioned. At the same time, shorter term nonclaim statutes cannot be deemed constitutionally sufficient by labeling them statutes of limitation when they are neither statutes of limitation by definition or in their application, allowing almost no chance of discovery of the need for presentation of a claim.

The second law review article cited by the Estate concerning what process is due to creditors in estate proceedings analyzes many of the cases cited by the parties herein. The article specifically addresses in great detail the effect of a requirement that a better kind of notice be given to creditors than that provided by publication.[6] The primary concern of the estate is apparently that litigation and delay would be promoted and that the personal representative of an estate would be forever subject to claims of creditors. However, as set forth in said article, at p. 705:

> This litigation and delay, however, results because due process was afforded to all creditors, including those with clearly valid demands and those willing to assert and pursue questionable claims. Each creditor has been entitled to choose for himself to have a day in court against the estate, just as he would have been entitled to choose to pursue his claim against the decedent during the decedent's lifetime. The interest in speedy and expeditious settlement cannot justify secrecy and lack of meaningful notice in the estates context merely because of the possibility of unjustified contentiousness any more than an interest in speedy dispute resolution could justify lack of notice in a condemnation action, bankruptcy proceeding, or action to settle a trustee's accounts. Speed and expedition should give way to due process. This especially is true in an estate proceeding in which the victims of the speedy settlement are persons whom the decedent had a legal obligation to pay.

[6] Fatzinger, *Notice to Creditors in Estate Proceedings: What Process is Due?* 63 N. Car. L. Rev. 659 (1985).

Additionally, the Estate fails to address the proposition set forth by TPCS of a due diligence requirement for actions taken by the representative of the estate in determining the identity of creditors, combined with a notice by publication to those creditors whose identity could not be determined through the exercise of due diligence. This proposed resolution of course eliminates any concern that the representative of an estate would be forever subject to claims of creditors. This is perhaps not an oversight by the Estate, however, since such a statutory scheme would in fact be reasonable as set forth by TPCS and could be implemented even with the use of the extremely short nonclaim statute available in the instant case.

Whether a claimant is allowed the opportunity to dis-

cover and present his claim as the result of the enactment by a state legislature of a true statute of limitations of a one or two year duration, or whether a claimant is afforded a shorter period of time within which to present a claim as in the instant case, the inquiry should be the same. Is the statutory scheme established by the legislature one that is reasonably related to the state interests involved, while at the same time affording a meaningful notice to a prospective claimant of the need to file a claim? The notice provided in the statutory scheme must be either a notice that has been deemed given by operation of law by virtue of the expiration of a one to two year period of time, or a notice that is in fact given by mailing to known creditors in a situation involving the expiration of a sixty day time period. Neither of these options has been provided by the statutory scheme in the instant case and such statutory scheme is therefore constitutionally deficient. Proper deference to and the preservation of legitimate state interests can still be accommodated while providing notice by mailing and such notice must be provided to meet the constitutional requirements of due process as set forth in *Mullane* and *Mennonite*.

CONCLUSION

The judgment of the Supreme Court of Oklahoma, in-

sofar as it upheld the constitutionality of the challenged statute, should be reversed.

Respectfully submitted,

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